Jurisdictional Statement

81-2077

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

GARY D. THOMPSON,
Appellant,

v.

STATE OF INDIANA,
Appellee.

APPEAL FROM THE
SUPREME COURT OF INDIANA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED UPON APPEAL

I. Does the just compensation clause of the fifth amendment, as applied to the states through the fourteenth amendment, require that a state pay interest on a judgment from the date of judgment when state law recognizes that the judgment creditor has a property interest in the judgment from the date it is awarded?

II. Does the equal protection clause of the fourteenth amendment permit a state to distinguish arbitrarily between tort and non-tort judgment creditors when the state pays interest on the judgments?

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OPINIONS BELOW

The opinion of the Court of Appeals of Indiana, dated August 19, 1981, is reported at 425 N.E.2d 167 (Ind. App. 1981) and is set out in the Appendix at pp. A-3 to A-52. A rehearing was denied, see p. A-53, and the Supreme Court of Indiana denied transfer, see p. A-54.

JURISDICTION

The judgment of the Court of Appeals of Indiana, First District, was entered on August 19, 1981, and a rehearing was denied on September 25, 1981. The Supreme Court of Indiana denied transfer of this case on February 9, 1982. A notice of appeal from this final judgment was filed in the Supreme Court of Indiana on May 3, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The just compensation clause of the fifth amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

The due process and equal protection clauses of the fourteenth amendment to the United States Constitution provide:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The 1974 version of § 34-4-16.5-17 of the Indiana Code (repealed 1980) provided:

> A claim or suit settled by, or a judgment rendered against, a governmental entity shall be paid by

> it not later than one hundred eighty (180) days after settlement or judgment, unless there is an appeal, in which case not later than one hundred eighty (180) days after a final decision is rendered. If payment is not made within one hundred eighty (180) days, the governmental entity is liable for interest from the date of settlement or judgment at an annual rate of eight percent (8%).

The 1980 version of § 34-4-16.5-17 of the Indiana Code provides:

> A claim or suit settled by, or a judgment rendered against, a governmental entity shall be paid by it not later than one hundred eighty (180) days after the date of settlement or judgment, unless there is an appeal, in which case not later than one hundred

eighty (180) days after a final decision is rendered. If payment is not made within one hundred eighty (180) days after the date of settlement or judgment, the governmental entity is liable for interest from the date of settlement or judgment at an annual rate of eight percent (8%). The governmental entity is liable for interest at that rate and from that date even if the case is appealed, provided the original judgment is upheld.

Public Law 142, 1974 Ind. Acts 599, 603, provides in pertinent part:

SECTION 2. There is hereby appropriated from the general fund of this state sufficient funds to settle claims and to satisfy tort judgments which have been or will be obtained against the State of Indiana and to pay expenses authorized

> by this Act, including liability insurance premiums, interest on said claims and judgments and expenses incurred by the attorney general in employing other counsel to aid in defending or settling claims or civil actions against the state. The attorney general shall have the authority and duty to present vouchers for the preceding items or expenses to the auditor of the state, who shall issue warrants on the treasury for the amounts so presented.

STATEMENT OF THE CASE

On July 17, 1973, Appellant Gary D. Thompson was injured in an automobile accident near Taylorsville, Indiana. A tractor and trailer unit was leaving a truck stop and pulling into the northbound lane of traffic. Because of the

design of the truck stop exit, the tractor and trailer unit sat with several feet of the trailer extending into the leftmost lane of the southbound traffic while waiting for the northbound traffic to clear. Appellant Thompson rammed into the flatbed trailer, causing permanent brain and brainstem damage and other injuries. A trial court awarded Thompson $1.24 million against the State of Indiana for misdesign of the truck stop exit and this award was affirmed by the Court of Appeals of Indiana, First District, on January 29, 1979. (The 1979 opinion is reported as Indiana v. Thompson, 385 N.E.2d 198 (Ind. App. 1979), and reproduced in the Appendix, beginning at p. A-55). The state appealed this decision but the Supreme Court of Indiana denied transfer on October 9, 1979. (A-131.)

Approximately one month later, on November 5, 1979, the state paid the principal amount of the judgment into court. Soon thereafter, Thompson sought interest on the judgment at the annual rate of eight percent from the date the trial court had entered its judgment. This motion was denied and Thompson appealed to the Court of Appeals of Indiana.

Several state law issues were raised, involving primarily the construction to be given to the 1974 version of Ind. Code § 34-4-16.5-17 (repealed 1980). Thompson contended that the intent of the legislature in passing this section was to require the payment of interest at an annual rate of eight percent from the date of the judgment if the state was not successful upon appeal.

In addition, Thompson raised constitutional questions upon his appeal

to the Court of Appeals of Indiana, contending that the 1974 version of Ind. Code § 34-4-16.5-17 deprived him of both due process and equal protection of the laws. Due process questions were raised because the state's retention and investment for its own use for some 40 months after the judgment of the money awarded to Thompson constituted an unconstitutional "taking" of private property without compensation. Equal protection questions were raised because the state irrationally discriminated against Thompson in two ways. First, the state discriminated between state tort judgment creditors, on the one hand, and judgment creditors of the state who were owed money from court action arising under any other theory, on the other hand. Second, the state discriminated between those tort judgment creditors who

received judgments while the 1974 version of Ind. Code § 34-4-16.5-17 was in effect, on the one hand, and, on the other, those who received tort judgments either before or after the effective dates of the 1974 version of this Code provision.

The Court of Appeals of Indiana upheld Ind. Code § 34-4-16.5-17 as interpreted by the state against both state law and constitutional challenges. (A-3.) The court of appeals relied on general principles of tort law to find that interest normally is not awarded as an element of damages in tort actions unless necessary to accomplish full compensation. (A-20.) Therefore, the court of appeals held that due process was not denied by the state not paying interest. The equal protection challenge was denied because the court of appeals found a rational basis for the difference

in classification between tort and non-tort judgment creditors and between tort judgment creditors who received their judgments on different dates. (A-41-47.)

The Supreme Court of Indiana denied transfer of this action (A-131) and a timely notice of appeal was filed (A-132).

REASONS FOR PLENARY CONSIDERATON

I. THE DUE PROCESS CLAUSE PROHIBITS THE STATE FROM KEEPING MONEY AWARDED ON A JUDGMENT WITHOUT PAYING INTEREST WHERE STATE LAW ESTABLISHES A PROPERTY INTEREST IN THAT JUDGMENT.

The facts of the present case are analogous to those found in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S. Ct. 446 (1980), and provide this Court with an opportunity to further explain its holding in that case. In Webb's Fabulous Pharmacies this

Court was faced with a challenge to a Florida statute that permitted a clerk of the circuit court to retain interest on money deposited with the court during interpleader litigation. Another statute permitted the clerk to retain a certain portion of the interpleader fund as his fee, and this statute was not challenged. This Court held that the county's retention of the interest under state statute constituted an unconstitutional taking of private property violative of the fifth and fourteenth amendments. 101 S. Ct. at 452. The key factor in this holding was that the interpleader fund "plainly was private property" and never became property of the state. Id. at 450. In exactly the same way, the judgment money owed to the Appellant Thompson by the State of Indiana has been Thompson's money since he first obtained

his judgment. The state's retention of that money during appeal without payment for its use is an unconstitutional taking of private property for public use without just compensation.

One lower court has explained well the elements that must be present for an unconstitutional taking to occur. There must be (1) a property interest, (2) state action, and (3) a lack of just compensation or due process. Kohlasch v. New York State Thruway Authority, 460 F. Supp. 956, 960 (S.D.N.Y. 1978). Certainly state action is present in this dispute: the judgment and interest collected on the judgment were retained by the state pursuant to the 1974 version of Ind. Code § 34-4-16.5-17 (repealed 1980). But see Ind. Code § 34-4-16.5-17 (1980). Equally certain is that the retention by the state was a "taking"

even though it was not permanent but lasted only for a 40-month period. See, e.g., Goss v. Lopez, 419 U.S. 565, 572-76 (1975). If, then, Thompson had a property interest in the judgment, this case is within the ambit of decisions such as Webb's Febulous Pharmacies, supra, 101 S. Ct. 446, and the Court of Appeals of Indiana was incorrect in determining that the judgment money was properly retained without just compensation.

This Court has noted the often-quoted principle that

> [p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent sources such as state law. . . .

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Under established Indiana

law, Thompson had a property interest in the judgment he was awarded from the date the trial court awarded it. Therefore, the state may not, as it did in the present situation, retain that judgment without paying for the public use made of the money during the time it was retained.

Indiana v. Daley, 165 Ind. App. 513, 332 N.E.2d 845 (1975), shows the state law clearly. Ironically, that case involved the same legislative scheme as is involved here. In Daley, the plaintiff had obtained a $400,000 tort judgment against the state. After the judgment was final but before the state paid it, state law was changed to reduce the state's maximum liability to $300,000. The state attempted to excuse itself from payment of $100,000 of the judgment because of the change in law but the

court ruled in the plaintiff's favor. "We consider it beyond serious dispute that Daley has a vested right granted by the final judgment of the original trial court." 332 N.E.2d at 849.

Such a holding is not a new twist on Indiana law but follows from well-settled principles. Thus, in Miller v. Jackson Township, 178 Ind. 503, 99 N.E. 102 (1912), a change of law was raised as a defense to a previously entered judgment. The court stated:

> Judgment was rendered in this cause long before the act in question was passed. In this appeal, the rights of the parties, under the judgment appealed from, were fixed by the law as it stood when the judgment was rendered. These rights were vested and could not be impaired by subsequent legislation.

99 N.E. at 111 (emphasis added).

Under Daley, supra, and Miller, supra, as well as numerous other cases, see cases cited in Daley, 332 N.E.2d at 849, Indiana law vests a property right in the judgment at the moment the judgment is entered. Thus, under the standard set forth by this Court in Board of Regents v. Roth, supra, 408 U.S. at 577, Thompson had a property interest in the judgment from the time it was entered. This interest may not be used by the state, even temporarily, without payment for its use if the state is not to run afoul of the just compensation clause of the fifth amendment as applied to the states through the fourteenth amendment.

Courts of the State of Indiana are very precise in their use of the term "vested right" and the use of that term

cited above should not be read in a loose manner. For example, the same court whose opinion is appealed here has noted that where a statute that would have imposed liability upon a designer and manufacturer was repealed before the date of an injury, the plaintiff on the date of repeal "[p]erhaps . . . possessed a contingency . . . but . . . no right to a cause of action had vested in her." Martin v. Simplimatic Engineering Corp., 390 N.E.2d 235, 237 (Ind. App. 1979) (emphasis added). Clearly then, courts in Indiana distinguish between a contingent and a vested property interest. When they state that a judgment has vested a property right, this rule cannot be read to mean that a judgment creditor such as Thompson has nothing more than a contingency interest. Compare Daley, supra, 332 N.E.2d at 849, and Miller,

supra, 99 N.E. at 111, with Martin, supra, 390 N.E.2d at 237.

Furthermore, the state legislature has recognized the existence of a property interest through the enactment of § 2 of Public Law 142, 1974 Ind. Acts 599, 602. This Act creates a fund sufficient "to satisfy tort judgments which have been or will be obtained against the State of Indiana . . ." along with miscellaneous related expenses including "interest on said claims and judgments . . . ." Id. The court of appeals dismissed this argument below by holding, essentially, that specific appropriations from this fund do not occur until the attorney general performs the ministerial action of presenting a voucher for the judgment amount to the state auditor. (A-19.) Be that as it may, such a holding does not change the fact that the state legislature has

anticipated an obligation to pay tort judgments and interest and, in doing so, recognized a right in tort judgment creditors to such judgments. The lack of a mere ministerial act by the attorney general does not change this obligation.

Thompson therefore had a property interest in his judgment from the date it was issued by the trial court. In a series of cases this Court has held that such a property interest may not be taken by the state without just compensation. E.g., Webb's Fabulous Pharmacies, supra, 101 S. Ct. 446. This Court should permit further discussion of the decision of the Court of Appeals of Indiana and hold that Thompson is entitled to interest on the judgment during the time that the state was holding the money it owed pending appeal.

II. THE EQUAL PROTECTION CLAUSE PROHIBITS THE STATE FROM MAKING ARBITRARY DISTINCTIONS BETWEEN TORT AND NON-TORT JUDGMENT CREDITORS.

The Court of Appeals of Indiana correctly identified the appropriate standards and law to be applied to this case in an analysis under the equal protection clause of the fourteenth amendment (A-37-40), but misapplied these standards to the facts of the present case. Thompson concedes that no suspect classification or fundamental right is involved and that therefore the statutory scheme should be upheld against an equal protection challenge if any rational reason exists for the state classification. E.g., City of New Orleans v. Dukes, 427 U.S. 297 (1976). And, as this Court noted years ago in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911), "if any state of facts reasonably can

be conceived that would sustain [the law], the existence of that state of facts at the time the law was enacted must be assumed."

Such a state of facts does not exist in the present case. At the time the judgment in Thompson's favor was entered by the trial court, the State of Indiana owed Thompson precisely what it would have owed any other judgment creditor, whether that judgment was obtained under a theory of contract, condemnation or anything else: the state owed Thompson a sum of money. The theory pursued in the underlying action does not change the identity and nature of what is owed on the judgment. To hold otherwise is to permit the state to make an irrational and arbitrary classification.

The Court of Appeals of Indiana justified the classification precisely

because of the nature of the underlying court action. (A-41-43.) That court ignored the nature of what is owed by the state in all such cases—money—and, furthermore, tried to justify the legislative classification between tort and non-tort judgment creditors in this way:

> While it may be possible for governmental entities to appropriate the approximate dollar amount of funds before they become due for payment of their contractual or condemnation debts, such is not the case with respect to tort liability. Aside from limited appropriations or insurance, which every governmental entity may not be authorized or financially able to obtain, one can safely say that a governmental entity does not plan to become indebted for a tort.

(A-42.)

This reasoning totally ignores the legislature's action in passing § 2 of Public Law 142, supra, 1974 Ind. Acts 599, 603. By virtue of this law, the legislature may not have planned to become indebted because of a tort. Nevertheless, it appropriated funds to cover just this contingency in exactly the same manner it appropriates funds to cover its potential liability under other theories of law. Thus, it is apparent that the legislative justification presumed by the court of appeals was, in fact, a reason specifically rejected by the legislature. This is even more apparent when one notes that Public Law 142, 1974 Ind. Acts 599, was the law that created the legislative scheme under question in this litigation. See the 1974 version of Ind. Code § 34-4-16.5-17 (repealed 1980).

Clearly the legislature, in passing

Public Law 142, was concerned with establishing a tort claims act for the state. It did not intend to classify those who owned tort judgments against the state any differently than it classified those who own other judgments against the state. This is shown by the addition to Public Law 142 of § 2, supra.

This Court has stated:

> The Equal Protection Clause of [the fourteenth] amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.

Reed v. Reed, 404 U.S. 71, 76 (1971). This Court must accept the statute as interpreted by the courts of Indiana, see Webb's Fabulous Pharmacies, supra,

101 S. Ct. at 450, and therefore the court of appeals' interpretation that the statute classifies Thompson and other tort judgment creditors in a manner different from the classification of other judgment creditors must be accepted. But this type of classification, unrelated to the purpose of the statute, is precisely what is prohibited by the equal protection clause. The clause "does require, in its concern for equality, that those who are similarly situated be similarly treated." Tussman & ten Broek, "The Equal Protection of the Laws," 37 Cal. L. Rev. 341, 344 (1949). Under Indiana law, state judgment creditors are not treated in similar ways.

In a recent decision under the equal protection clause, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S. Ct. 715 (1981), this Court held valid

a legislative distinction between plastic and cardboard milk containers. The distinction was found to have a rational relationship to the purposes of the statute. 101 S. Ct. at 724-27. No such relationship exists in the Indiana arbitrary distinction between different persons to whom the state owes money by virtue of a court judgment. The classification does not meet any stated legislative objective. The objective presumed by the court of appeals, in fact, is denied by the legislation that is involved. Providing by legislature that Indiana citizens have a cause of action against the state for torts committed by the state is in no way related to any requirement that the state not pay interest on judgments awarded against it.

The opinion of the court of appeals fails to recognize this clear standard

in the application of the equal protection clause. This Court should permit further discussion so that Appellant Thompson can show in more detail that the decision below was wrong.

CONCLUSION

The opinion of the Court of Appeals of Indiana has failed to apply the correct standards in its decision concerning the due process and equal protection clauses. Appellant Thompson has been denied use of his property interest in the judgment he received from the State of Indiana for a period of 40 months without being paid compensation for this loss. Additionally, the legislative classification that denied him this property interest has no rational basis and is not rationally related to the purpose of the statute.

For the aforementioned reasons, the Appellant prays that this Court grant plenary review of the decision of the Court of Appeals of Indiana.

Respectfully submitted,

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I hereby certify that I have on this _____ day of May, 1982, mailed three copies of this jurisdictional statement, first class, postage prepaid, to:

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Appendix

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

GARY D. THOMPSON,
Appellant,

v.

STATE OF INDIANA,
Appellee.

JURISDICTIONAL STATEMENT ON APPEAL FROM THE SUPREME COURT OF INDIANA

APPENDIX

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Court of Appeals of Indiana,
First District.

GARY D. THOMPSON,

Appellant-Plaintiff,

v.

STATE OF INDIANA,

Appellee-Defendant.

No. 1-1080A291.

August 19, 1981.

RATLIFF, Judge.

STATEMENT OF THE CASE

Gary D. Thompson appeals the Johnson Circuit Court's overruling of his Motion for Order and Judgment Compelling Payment by Defendant of Interest Upon Judgment. We affirm.

STATEMENT OF THE FACTS

Thompson, who sustained injuries in 1973, obtained a $1.24 million tort judgment against the State of Indiana

in July 1976. The state unsuccessfully appealed that judgment, and the Indiana Supreme Court denied transfer on October 9, 1979. See State v. Thompson, (1979) Ind.App. 385 N.E.2d 198, trans. denied. On November 5, 1979, the state paid the principal amount of the judgment into court. Thompson filed his Motion for Order and Judgment Compelling Payment by Defendant of Interest Upon Judgment which the trial court overruled on February 6, 1980.

ISSUES

I. Is subsection 17 of Acts 1974, P.L. 1942, § 1, pp. 602-603 ambiguous?

II. Does the denial of interest in this case permit an unconstitutional taking of Thompson's property by the state without just compensation and thus constitute denial of due process of law?

III. Does the denial of interest pending the state's appeal of Thompson's favorable tort judgment amount to a denial of equal protection of the law?

IV. Is Ind.Code 34-4-16.5-17 a special law resulting in the granting of privileges and immunities to certain classes of citizens such as is prohibited by the Indiana Constitution?

DISCUSSION AND DECISION

Issue One—Ambiguity of the Statute

On February 19, 1974, the Indiana Tort Claims Act (the Act), Ind.Code 34-4-16.5-1 et seq., became effective. Subsection 17, concerning interest which may be obtained on judgments rendered against a governmental entity, read as follows:

"A claim or suit settled by, or a judgment rendered

against, a governmental entity shall be paid by it not later than one hundred eighty (180) days after settlement or judgment, unless there is an appeal, in which case not later than one hundred eighty (180) days after a final decision is rendered. If payment is not made within one hundred eighty (180) days, the governmental entity is liable for interest from the date of settlement or judgment at an annual rate of eight percent (8%)."

Acts 1974, P.L. 142, § 1, pp. 602-603.

On March 3, 1980, IC 34-4-16.5-17 was amended:

"SECTION 1. IC 34-4-16.5-17 is amended to read as follows: Sec. 17. A claim or suit settled by, or a judgment rendered against, a governmental entity shall be paid by it not later than one hundred eighty (180) days after the

date of settlement or judgment, unless there is an appeal, in which case not later than one hundred eighty (180) days after the final decision is rendered. If payment is not made within one hundred eighty (180) days after the date of settlement or judgment, the governmental entity is liable for interest from the date of settlement or judgment at an annual rate of eight percent (8%). The governmental entity is liable for interest at that rate and from that date even if the case is appealed, provided the original judgment is upheld.

"SECTION 2. (a) Notwithstanding the conflicting provisions of IC 34-4-16.5-17, for any case on appeal on the effective date of this act upon which a final decision has not been rendered or a final settlement has not been reached, any interest required to be paid by IC 34-4-16.5-17 accrues

> and accumulates only from the effective date of this act.
>
> (b) Because an emergency exists, this act takes effect upon passage."

Acts 1980, P.L. 198, p. 1630.

Thompson contends that the second sentence of the 1974 version of subsection 17 of the Act is patently ambiguous and should be interpreted to allow eight percent interest upon his judgment from the date thereof even though an appeal had been taken. The state argues correctly we believe, that this question has already been decided adversely to Thompson by the interpretation of the statute given by this court in Speidel v. State, (1979) Ind.App., 386 N.E.2d 180, trans. denied, Glick v. Department of Commerce, (1979) Ind.App., 387 N.E.2d 74, trans. denied and Holt v. City of

Bloomington, (1979) Ind.App., 391 N.E.2d 829, trans. denied. In all three of these cases, this court found the "final decision" language of the statute to be unambiguous. In Speidel, the "final decision" was held to be the denial of transfer by the supreme court. In Glick, it was the appellate court's decision because no further petitions were filed; Judge Lybrook implicitly dismissed the idea of ambiguity in the statute at 387 N.E.2d 77:

> "Although the trial court rendered judgment in the original action on September 28, 1976, the State appealed the case to the Indiana Court of Appeals. Thereafter, the appeal was exhausted when this court affirmed the trial court's decision on February 13, 1978, since procedures for rehearing and transfer were never instituted.

"Statutes are to be construed to give effect to the ordinary and plain meaning of the words used. If the intent of a statute is unmistakable and its meaning so plain and unambiguous that there is no room for judicial construction, we will adopt the meaning plainly expressed. Bowen v. Review Board of Indiana Employment Security Division (1977), Ind.App. 362 N.E.2d 1178.

"Clearly, there is no need for judicial construction here, where the statute provides that the 180-day period begins to run at the date of settlement or judgment 'unless there is an appeal, in which case not later than one hundred eighty [180] days after a final decision is rendered.'

"The Court of Appeals rendered its judgment on February 13, 1978, and since no petition for rehearing was filed thereon,

> the Court of Appeals judgment was the 'final decision' from which the 180-day period would run. The State paid the judgment principal plus costs to the Bartholomew County Clerk on April 5, 1978, well within the time period allowed, and therefore was not liable for any interest under the statute."

In Holt, the court faced squarely the question of ambiguity, and Judge Garrard unequivocally rejected the same charge as Thompson's:

> "If the General Assembly had intended to equate 'final decision' with 'judgment,' it would not have used both those terms in the same section. Furthermore, if those terms were synonymous, the exception in the first sentence of IC 34-4-16.5-17 [footnote omitted] would be totally redundant. . . .
>
> . . . .
>
> "The General Assembly has

> expressed itself unambiguously and with sufficient clarity."

391 N.E.2d at 832-33.

Furthermore, from the language of Acts 1980, P.L. 198, § 2(a), p. 1630, it is clear that the amendment permitting interest to accrue from the date of judgment was not intended to apply retroactively. We must reject Thompson's argument that the 1974 version of the statute contained a drafting error which the legislature corrected in 1980. Thus, Thompson, as a tort judgment creditor of the state, would be entitled to collect interest on his judgment entered on July 20, 1976, only if the state had failed to pay the judgment within one hundred and eighty days after transfer was denied by our supreme court on October 9, 1979. Because the state paid the entire amount of the judgment into court on November

5, 1979, the trial court properly decided under the statute that Thompson was not entitled to interest.

Issue Two—Due Process, Unjust Compensation

Thompson contends that denial of interest on his $1.24 million judgment against the state pursuant to Ind.Code 34-4-16.5-17 for almost forty months involved in the state's appeal of this case constituted a taking of his property without just compensation which is forbidden by both the Fourteenth Amendment of the United States Constitution[1] and Article I, Section 21 of the Indiana Constitution.[2] The reasoning on which he builds his argument is based on analogy with law in eminent domain cases and can be outlined in the following manner

1. A judgment obtained in a tort action against the state is a vested property right. State v. Daley, Admx., (1975) 165 Ind.App. 513, 332 N.E.2d 845.

2. Both the Federal and Indiana Constitutions preclude the taking of private property or even the interference with a property right for public benefit without just compensation. Schnull v. Indianapolis Union R. Co., (1921) 190 Ind. 572, 131 N.E. 51.

3. One of the elements of just compensation is interest. State v. Stabb, (1948) 226 Ind. 319, 79 N.E.2d 392.

4. The legislature may prescribe and alter the rate of interest to be paid in condemnation awards so long as the interest they set is not so unreasonably low as to amount to a deprivation of just compensation.

Gradison v. State, (1973) 260 Ind. 688, 300 N.E.2d 67. Thompson asserts that awards of interest in tort judgments obtained against the state are constitutionally mandated by the same language which mandates interest in condemnation awards.

Thompson's facially appealing argument is fatally flawed in several respects. First he fails to distinguish between pre-judgment interest (interest qua damages) and post-judgment interest (interest eo nomine). See Note, Interest on Verdicts and Judgments in State and Federal Courts, 38 Notre Dame Law. (1962). Second, he ignores the distinct historical developments with respect to both types of interest in eminent domain, contract, and tort cases. See Annot., "Retrospective application and effect of statutory provisions for

interest on changed rate of interest," 4 A.L.R.2d 932 (1949). Finally, he blithely dismisses the historical context of the legislation in question in two sentences and confines his discussion of the legislative history of Acts 1974, P.L. 42, § 1, pp. 602-603 to allegations of a drafting error based upon an affidavit of one of the co-authors of the bill.

We note that the cases which Thompson cites in support of his "just compensation—due process" arguments are almost exclusively eminent domain cases which treat interest as a part of the issue of damages. For example, Thompson cites us to Morton Grove Park District v. American National Bank and Trust Co., (1980) 78 Ill.2d 353, 35 Ill. Dec. 767, 399 N.E.2d 1295, in support of his position that he, in fact, had a vested property right in his

$1.24 million judgment because the actual funds for payment of his claim were already appropriated by the General Assembly in Acts 1974, P.L. 142, § 2, p. 603[3] and that the state, therefore, took the use of his money for the public's benefit during the three years pending appeal. We find Morton Grove inapposite to the case at bar for several reasons. First, it is an eminent domain case in which interest is traditionally viewed as part of the measure of damages to be paid from the date of the taking, not just from the date of judgment. The trial court there, however, vested possession of the real estate in the condemnor as of the date of judgment. Second, it involves two specific Illinois statutes, unlike any involved in the case at bar. One provides that the condemnees' award is to be deposited by the condemnor

with the county treasurer pending an appeal. Another requires that all earnings on investment by the county treasurer are to accrue to the benefit of the county to be used for county purposes. The court's decision to award the condemnees the precise amount of interest which the county actually earned on the specific funds which were paid over the treasurer in the name of the condemnees turned on the fact that the funds specifically belonged to the condemnees. The court construed the statutory language requiring the earnings on investments of county moneys "to whomsoever belonging" to be used for county purposes as not referring to the private property of the condemnees and thus found the statute did not apply to their award. This case is easily distinguishable from

the case at bar for, as pointed out by Thompson himself, the $1.24 million dollars required to pay his award were not separated during appeal from the state's general fund for investment or any other purposes. Furthermore, the very section of the statute which Thompson cites in support of his argument that the funds were appropriated also provides that allocation of the appropriated funds for a specific claim does not occur until the attorney general presents a voucher to the auditor of the state who in turn issues a warrant to the treasury. (See footnote 3 above. One can foresee real problems in the calculation and payment of interest under this sytem if interest were permitted to accrue from the date of judgment until time of payment. See e.g., 1947 Op. Att'y Gen. No. 10.) Thompson's argument that the state took the use of his specific property for

public benefit based on the Morton Grove case must fail.

The issue in Thompson's case on the other hand, has to do with the right to recover interest upon a judgment, or interest eo nomine. Although it may be deemed a taking of private property without just compensation, hence unconstitutional, to deny a reasonable rate of interest in pre-judgment awards in eminent domain cases, Schnull v. Indianapolis Union Ry. Co., supra, such has never been the rule with respect to torts. Courts have traditionally allowed interest as an element of damages in tort actions only where the damages are fixed or definite and such additional damages are necessary to accomplish full compensation. Ft. Wayne National Bank v. Scher, (1981) Ind.App., 419 N.E.2d 1308, (trans. pending); 9 I.L.E. Damages

§ 49 (1971); 22 Am.Jur.2d Damages § 194 (1965).

The right to recover interest on judgments was not a feature of the common law, Note, supra, and in Indiana interest is said to be a "creature of statute." Frazer v. Boss, (1879) 66 Ind. 1, 17. From this it follows that the recovery of interest is not a constitutionally guaranteed right. 1947 Op. Ind. Att'y Gen. No. 10. Today, of course, interest is not viewed with the same disdain as it was at the time of Henry VIII, see Frazer v. Boss, supra, and the recovery of post-judgment interest appears to be a common occurrence. Note, supra. We remind Thompson of the words of Justice Stewart that "[p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing

rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents of State Colleges v. Roth, (1972) 408 U.S. 564, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548. While the cases which Thompson cites both from Indiana and from other jurisdictions in which interest was permitted upon tort judgments rendered against governmental entities may suggest a change in the common law, they do not bestow upon Thompson a vested property right to have interest accrue upon his judgment immediately upon entry thereof. In Munn v. Illinois the United States Supreme Court wrote in 1876:

> "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of

> municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

94 U.S. 113, 134, 24 L.Ed. 77.

Placed in its historical context of time and circumstances, moreover, the issue of interest in this case cannot be properly reviewed apart from the doctrine of sovereign immunity. Although the common law doctrine of sovereign immunity in Indiana was virtually

eliminated by our supreme court in Campbell; Knotts v. State, (1972) 259 Ind. 55, 284 N.E.2d 733, the court there pointed out that problems resulting from the abolition of the doctrine with respect to the state's liability were questions for the legislature:

> "The state argues that abolition of sovereign immunity will result in a great number of problems for the state. . . . The arguments which the state presents are questions which properly belong to the legislature in facing and solving the problems of liability."

at 284 N.E.2d 736. There is no question but that the traditional doctrine of sovereign immunity incorporated not only immunity from liability for torts, but also immunity from liability for interest. See Anglin & Stevenson v. United States,

(10th Cir. 1947) 160 F.2d 670. As expressed by the United States Supreme Court: "[I]n the absence of constitutional requirements, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress [or contract]. . . . The consent necessary to waive the traditional immunity must be express, and it must be strictly construed." United States v. N.Y. Rayon Importing Co., (1947) 329 U.S. 654, 658-59, 67 S.Ct. 601, 603-04, 91 L.Ed. 577, 581-82.

We note that the complete and total denial of interest to all tort judgment creditors of the state is not the real issue in the case at bar, because even under the statute in effect at the time of judgment Thompson was entitled to recover interest under certain specified

conditions. The facts in this case are not such that prior to February 19, 1974, tort judgment creditors of the state were entitled to interest upon their judgments and immediately thereafter they were not. Rather, the facts are that prior to February 19, 1974, tort judgment creditors had been permitted interest upon their judgments from the date of their entry whereas after that date interest was permitted to accrue only from the date of the final decision on appeal.

Furthermore, the procedural aspect of the due process issue has already been determined contrary to Thompson's position in Speidel v. State, supra, Glick v. Department of Commerce, supra, and Holt v. City of Bloomington, supra, where this court reiterated that the 1974 version of Ind.Code 34-4-16.5-17 did

not retroactively destroy a plaintiff's right to interest from the date of judgment inasmuch as any right plaintiffs had to interest thereon vested only as of the date of judgment. Perhaps because Thompson makes no distinction between procedural due process and substantive due process analyses[4] he fails to perceive these cases as determinative. Procedural due process analysis looks first to determine whether there is a constitutionally protected property or liberty interest which is the subject of state action. If there is only an expectancy interest and not a legitimate claim of entitlement to a benefit then a constitutionally ordained notice and hearing are not required before the state action effects a change in the expected benefit. See Board of Regents of State Colleges v. Roth, supra; Perry v. Sindermann,

(1972) 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570. While most of Thompson's due process arguments are addressed to matters of a substantive due process nature, several statements suggest to violations of procedural due process as well. We put those arguments to rest here.

The thrust of Thompson's due process challenge to the constitutionality of Acts 1974, P.L. 142, § 1, pp. 602-603, must rest on the substantive aspects of the issue as he perceives it on page 91 of his Brief:

> "Constitutional due process as applied here guarantees against arbitrary legislation, demanding that it shall not be unreasonable, arbitrary or capricious and that the requirements therein shall have a real and substantial relation to the purpose of

the act."

Thompson, of course, finds the legislation to be arbitrary and capricious and to bear no rational relationship to the purpose of the Act. We disagree.

Our standard of review in approaching questions as to the constitutionality of a statute was set forth by the Indiana Supreme Court in Sidle v. Majors, (1976) 264 Ind. 206, 341 N.E.2d 763, 766:

> "In approaching a consideration of the constitutionality of a statute, we must at all times exercise self restraint. Otherwise, under the guise of limiting the Legislature to its constitutional bounds, we are likely to exceed our own. That we have the last word only renders such restraint the more compelling. We, therefore, remind ourselves that in our role as guardian of the constitution, we are

> nevertheless a court and not a 'supreme legislature.' We have no right to substitute our convictions as to the desirability or wisdom of legislation for those of our elected representatives. We are under a constitutional mandate to limit the General Assembly to its lawful territory of prohibiting legislation which, although enacted under the claim of a valid exercise of the police power, is unreasonable and oppressive. Nevertheless, we recognize that the Legislature is vested with a wide latitude of discretion in determining public policy. Therefore, every statute stands before us clothed with the presumption of constitutionality, and such presumption continues until clearly overcome by a showing to the contrary."

Furthermore, "[b]efore a statute will

be declared repugnant to the Constitutions its fatal constitutional defects must be clearly apparent." Johnson v. St. Vincent Hospital, Inc., (1980) Ind., 404 N.E.2d 585, 591. Merely declaring that one can perceive no rational basis for the legislation as Thompson does here does not mean that there is none.

It is true that legislative history in Indiana is difficult to reconstruct, and legislative intent, if not apparent from the face of the statute itself, is frequently the result of educated conjecture and surmise. In Campbell v. State, supra, the court acknowledged specific concerns of the state if sovereign immunity were to be abandoned in toto, and legal scholars since the inception of the doctrine have argued its pros and cons. See, e.g., Note, Tort Liability of the State of Indiana:

Perkins v. State, 46 Ind.L.J. 544 (1971); Note, Sovereign Immunity in Indiana—Requiem? 6 Ind.L.Rev. 92 (1972). One of the most persistent concerns raised in support of the doctrine of sovereign immunity is the specter of depletion of the public treasury to the point where the normal functioning of government could be jeopardized. The matter of fiscal responsibility, that is, of raising and distributing revenues, is charged by Article 10 of the Indiana Constitution to the legislature. We conclude then that the object of the Tort Claims Act, and more specifically of subsection 17, is to protect the fiscal integrity of governmental entities by limiting their liability not only for damages in tort, but also for the interest recoverable upon these damages. We have already determined that such action was not

constitutionally precluded, and we conclude now that it was reasonable and prudent for them to do so.

We may take judicial notice of shrinking surpluses in public treasuries as well as of the imminence of bankruptcy faced by some of the large municipal corporations throughout the country. One of the objectives in providing a governmental entity with almost six months from the date of the final determination within which to pay a judgment without interest has to be to give that entity time in which to appropriate the amount of the judgment or to raise it by some other means.[5] It is reasonable to assume that it might take somewhat longer for a governmental entity to raise the larger amounts of money that could be recovered against it in causes of action which had accrued prior to the

enactment of the Tort Claims Act and during such time as the doctrine of sovereign immunity was in a state of flux than after the payment mechanisms established by the Act became effective.[6] Many governmental entities other than the state would need time to procure insurance and could have suffered significant cash flow adversities in the interim had unlimited damage and interest liabilities been permitted. There is, therefore, a real and substantial relationship between the requirement of the Act, i.e., the putting off of the recovery of potentially large amounts of interest for a significant period of time, and the purpose of the Act, i.e., preservation of the fiscal integrity of governmental entities.

Thompson has failed to convince us either that he was entitled to

interest under the statute or that his right to recover interest upon announcement of the judgment was vested such that interference therewith by the legislature constituted a taking of that award without compensation. Because there was no taking there could be no denial of procedural due process. Because the object of the legislation was reasonable and the means chosen to effect the legislative intent were substantially related thereto, the statute does not unconstitutionally deny Thompson substantive due process of law.

Issue Three—Equal Protection

Thompson sets out an array of interest statutes involving judgment creditors of the state which provide for various interest rates and starting dates from which interest accrues: e. g., Ind.Code

34-2-22-1 states that where a money judgment is recovered against the state, interest at six percent per year shall attach beginning with the forty-fifth day after judgment; Ind.Code 32-11-1-8 provides that in an exception to an appraiser's report in an eminent domain case interest may be recovered at eight percent per annum on the amount of damages from the date the governmental entity takes possession of the property, provided, however, that the landowner may recover no interest if he is entitled to withdraw the funds and use or invest them; Ind.Code 34-4-16-6 allows interest at six percent per year upon a judgment rendered against the state by the Superior Court of Marion County or the supreme court "from the date of the adjournment of the next ensuing session of the general assembly" until the

judgment is paid.[7] Thompson declares that since all judgment creditors of the state are "similarly situated" they should all be treated alike and that, because they are not, the entire legislative scheme is unconstitutional.

The state points out that interest is purely a legislative matter and that as long as the statutory classifications have a reasonable basis, they will not be held to violate equal protection. We agree. The state further argues that the equal protection question has already been decided adversely to Thompson in Holt v. City of Bloomington, (1979) Ind. App., 391 N.E.2d 829.

Although the equal protection question was addressed by this court in Holt, Thompson is correct in asserting that the specific aspect of this question which he raises is different from that

disposed of there. Holt held that the classifications of "(1) governmental tort-feasors, who are entitled to a grace period of 180 days, as opposed to private tort-feasors, who are not; or (2) victims of negligence of governmental entities, who are not entitled to interest if the judgment is paid within 180 days, as opposed to victims of negligence of private parties, who are entitled to interest" are not arbitrary or invidious classifications. Holt v. City of Bloomington, supra, at 391 N.E.2d 833. Thompson, on the other hand, argues that there are two other arbitrary and invidious classifications within the judgment creditor classification in the legislation under scrutiny which deny him equal protection of the law: (1) tort judgment creditors of the state as opposed to non-tort judgment creditors

of the state and (2) tort judgment creditors of the state who have obtained or will obtain their judgments prior to February 19, 1974, or after March 3, 1980, as opposed to tort judgment creditors of the state who obtained their judgments between February 19, 1974, and March 3, 1980. Thompson states, "Once one becomes a creditor or judgment creditor of the State of Indiana or any other governmental entity the nature of the claim becomes of no importance or significance because only money is then owing or potentially owing from the public funds; this money is owing regardless of whether the original claim was in tort, breach of contract, eminent domain, or any other type of suit or claim. Once a certain sum of money is due or owing to a governmental creditor or governmental judgment creditor then

all of the creditors are 'similarly circumstanced' and must be treated alike." (Appellant's Brief at 60-61.)

We have held that statutory classifications are not constitutionally prohibited so long as they are reasonable and not arbitrary. Kinslow v. Cook, (1975) 165 Ind.App. 623, 333 N.E.2d 819. We determined in Issue Two that Thompson had no fundamental right to the immediate accrual of interest upon his tort judgment obtained against the state, and Thompson does not aver that the classification of which he is a member is constitutionally suspect.

> "Where neither a fundamental right nor a suspect classification is involved, the standard of review is that the classification not be arbitrary or unreasonable and that a 'fair and substantial' relationship exist between the classification

> and the purpose of the legislation creating it. Sidle v. Majors, supra. It is the nature of the individual interests at stake which determines the applicable equal protection test."

Johnson v. St. Vincent Hospital, Inc., supra, at 404 N.E.2d 600. Under this standard of scrutiny we have already determined in Issue Two that there is a rational basis to the legislature's attempt to protect the public treasury from unlimited liability in tort. We hold now that the classification of tort judgment creditors of the state as opposed to non-tort judgment creditors of the state to be reasonable classifications when viewed with regard for those same historical and public policy considerations. Several statutory methods have been alluded to in footnote 5 which governmental entities use in order to

pay judgment claims entered against them: appropriation of funds for claims which might arise, levy of a tax to pay the judgment after it is obtained, and purchase of insurance to cover potential liability. While it may be possible for governmental entities to appropriate the approximate dollar amount of funds before they become due for payment of their contractual or condemnation debts, such is not the case with respect to tort liability. Aside from limited appropriations or insurance, which every governmental entity may not be authorized or financially able to obtain, one can safely say that a governmental entity does not plan to become indebted for a tort. It does not appear arbitrary or unreasonable, therefore, when providing for interest against a governmental entity for the legislature to provide a longer

period of time for that entity to raise funds to cover a tort claim than to cover either a contract or an eminent domain award.

Likewise, it does not appear to us arbitrary or unreasonable for the legislature to distinguish governmental tort judgment creditors who recovered their judgments between February 19, 1974, and March 3, 1980, from those who recovered judgments thereafter. It would appear from the 1980 legislation concerning retroactivity that the legislature, while realizing that it could not limit the government's liability for damages in causes which arose prior to February 19, 1974, could attempt to limit its ultimate monetary responsibility by precluding accrual of interest during appeal. Thus, the denial of interest to tort judgment creditors of

governmental entities during an appeal was a reasonable method of holding down overall liability in the face of essentially limitless awards while at the same time affording some protection of such award from unfair erosion by inflation which might be caused by an unreasonable delay in payment after the government's liability had finally and irrevocably been established. It is reasonable to assume, as the legislature apparently did, that few tort judgments obtained against governmental entities after March 3, 1980, would have been based on causes of action which arose prior to February 19, 1974; therefore, it decided to provide interest from the date of settlement or judgment even if an appeal were taken where the limits of liability were set at only $300,000 per person. If whether or not to award

post-judgment interest is related to the overall concept of damages as they attempt to afford full and just compensation, then we should not fail to note that Thompson was able to recover a much larger award initially than other tort claimants who, though they were entitled to interest from the date of judgment regardless of an appeal, were limited initially to a $300,000 recovery for possibly even greater injuries than Thompson suffered. The classification of which Thompson complains is not, in the final analysis, any more fundamentally disadvantaged by the legislation than are the members of the class whose position he covets.

Frankly, we sympathize with Thompson's disappointment over the loss of potential interest earnings on $1.24 million for more than three years

pending the state's appeal. We judicially note the rising interest rates during 1976-1979, but note also an even more rapid rise in rates since that time. Nevertheless, we also note that none of the statutory interest rates cited by either Thompson or the state provide for the compounding of interest[8] or even the rate of interest at which a judgment creditor could earn in the current money market. This is true even though beginning in 1982 those statutory rates will rise to ten and twelve percent. Clearly the legislative intent in setting interest rates is not to match the investment potential of the private sector. Yet, this fact has never been considered fundamentally unfair.

While it may appear to all judgment creditors of governmental entities that they are similarly situated and should

be treated in exactly the same manner, it is clear from the equally valid position of public policy considerations that separate classifications of judgment creditors of the government have rational and justifiable bases. We hold that a fair and substantial relationship exists between the classifications posited above and the purpose of the legislation, and we conclude, therefore, that Ind.Code 34-4-16.5-17 does not offend the equal protection standards imposed by either our federal or state constitutions.

Issue Four—Privileges and Immunities; Special Law

Thompson states: "The 'fair and substantial relation standard' [set out in Johnson v. St. Vincent Hospital, Inc., supra], is to be applied in an examination under both Article I, § 23[9] ('privileges and immunities') and Article IV,

§§ 22[10]-23[11] ('no local or special laws') of the Indiana Constitution." (Appellant's Brief at 67.) We concur. Having decided that there is a fair and substantial relationship between the objective of the legislation and the classifications chosen by the legislature to effect that purpose, we find this issue to have been subsumed by the discussions in Issues Two and Three. Thus, we find no violations of either Article I, § 23 or Article I[V]. §§ 22-23 of the Indiana Constitution.

Judgment affirmed.

NEAL, P.J., concurs.

ROBERTSON, J., dissents with opinion.

ROBERTSON, Judge, dissenting.

I respectfully dissent from the conclusion and result of the majority opinion. The fundamental issue is whether Thompson was denied due process by the

State's use of his property without just compensation, an act plainly and expressly forbidden by both the state and federal constitutions. Thompson, in my opinion, makes a more than adequate case for redress of his loss of interest. Using the logic of Schnull v. Indianapolis Union R. Co., (1921) 190 Ind. 572, 131 N.E. 51, Thompson can legally, and should morally, be compensated for the State's use of his money.

I would reverse the trial court.

FOOTNOTES:

[1]U.S. Const. amend. XIV, § 1: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

[2]Ind.Const. art. I, § 21: "No man's property shall be taken by law, without just compensation. . . ."

[3]"Section 2. There is hereby appropriated from the general fund of this state sufficient funds to settle

claims and to satisfy tort judgments which have been or will be obtained against the State of Indiana and to pay expenses authorized by this Act, including liability insurance premiums, interest on said claims and judgments and expenses incurred by the attorney general in employing other counsel to aid in defending or settling claims or civil actions against the state. The attorney general shall have the authority and duty to present vouchers for the preceding items or expenses to the auditor of the state, who shall issue warrants on the treasury for the amounts so presented."

[4]In fact, Thompson commingles all of his constitutional arguments under each issue throughout his brief. We have attempted to group them under appropriate issue headings in the interests of judicial economy and cogent analysis.

[5]For example, Ind.Code 34-4-16.4-1 (Burns Code Ed., Supp. 1980) sets out the methods by which a city or county will approach payment of judgments rendered against them:

> "(a) A judgment against a county or city may be enforced only from appropriations made for that purpose.
>
> (b) The proper officers of the county or city may be compelled by mandamus proceedings to make the necessary provisions for appropriating, levying, and collecting by taxation the sum necessary

for the payment of a judgment. In the mandamus proceedings:

(1) The respective bodies and officers may be sued collectively by their legal names;

(2) Service of process may be made on any member of the respective bodies; and

(3) All members of the respective bodies are bound by the judgment.

(c) If a city is entitled to an appeal, the appeal shall be granted without bond. A judgment against a city may not be enforced pending an appeal. [IC 34-4-16.4-1, as added by Acts 1980, P.L. 8, § 170.]"

Ind.Const. Article 10 § 3 states: "No money shall be drawn from the Treasury, but in pursuance of appropriations made by law." See also, footnote 3, supra.

[6]We point Thompson to some of the documented logistics problems which the state faced after Perkins v. State, (1969) 252 Ind. 549, 251 N.E.2d 30 and prior to enactment of the Tort Claims Act in footnote 35, Note, 46 Ind.L.J. 544 at 551, supra.

[7]We note that the Indiana General Assembly raised the interest rates of IC 34-2-22-1, 34-4-16-6, and 34-4-16.5-17 effective January 1, 1982.

[8]Courts have traditionally been hostile to the idea of compound interest on damages. See Indiana Telephone Corp.

v. Indiana Bell Telephone Co., (1976) 171 Ind.App. 616, 360 N.E.2d 610; McCormick, Damages § 53 (1935).

[9]"The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

[10]"The General Assembly shall not pass local or special laws, in any of the following enumerated cases, that is to say: . . . (15) In relation to interest on money; . . ."

[11]"In all cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

COURT OF APPEALS
OF INDIANA

GARY D. THOMPSON,
Appellant-Plaintiff,

v.

STATE OF INDIANA,
Appellee-Defendant.

No. 1-1080A291

You are hereby notified that the Court of Appeal has on this day Appellants petition for Rehearing Denied. Buchanan, C.J..

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 25th day of Sept., 1981.

/s/Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

SUPREME COURT OF INDIANA

GARY D. THOMPSON,
Appellant,

v.

STATE OF INDIANA,
Appellee.

No. 1-1080A291

You are hereby notified that the Supreme Court has on this day ["]Appellant's (Thompson) Motion for Oral Argument" is hereby Denied. Givan, C.J. All Justices Concur.

"Appellant's (Thompson) Petition to Transfer" is hereby Denied. Givan, C.J. All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 9th day of February, 1982.

/s/Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

Court of Appeals of Indiana,
First District.

STATE OF INDIANA,

(Defendant below),

v.

GARY D. THOMPSON and PAUL C. THOMPSON, Appellees

(Plaintiffs below),

and

AMERICAN OIL COMPANY, INC., Appellee

(former third-party Defendant below).

No. 1-177A10.

January 29, 1979.

LYBROOK, Presiding Judge.

The State appeals from 1) an adverse judgment entered on a jury verdict in the amount of $1,240,000 in favor of Gary Thompson; and 2) a dismissal of the State's third-party complaint against the American Oil Company (Amoco) for indemnity. The theory of Thompson's

complaint against the State was that the State "negligently marked, designed, constructed, engineered and maintained" a section of U. S. Highway 31 at its intersection with Interstate highway 65 in Bartholomew County, resulting in an auto-truck collision in which Thompson received severe and permanent injuries.

The following issues are raised for our review:

I. Whether the State of Indiana is immune from suit for design defects in a State highway;

II. Whether there was sufficient evidence to support the jury's finding that the State's actions were the proximate cause of Thompson's injuries;

III. Whether Thompson's conduct constituted contributory negligence as a matter of law;

IV. Whether Thompson was limited to a recovery of $300,000 in view of the provisions of the Indiana Tort Claims Act.[1]

V. Whether the trial court erred in granting Thompson's motions in limine and thus excluding all evidence of a loan receipt agreement executed between Thompson and certain defendants;

VI. Whether the court erred in excluding evidence of a covenant not to execute entered into between Thompson and certain defendants;

VII. Whether the alleged misconduct of a juror requires a new trial;

VIII. Whether the damages were excessive; and

IX. Whether the trial court erred in dismissing the State's third-party complaint against Amoco.

We affirm the judgment entered by the trial court on the jury's verdict in favor of Thompson and against the State; we further affirm the trial court's dismissal of the State's third-party complaint against Amoco.

FACTS

On July 17, 1973, at approximately 10:15 P.M., Gary Thompson was driving south on four-lane U.S. highway 31 in Northern Bartholomew County, approaching and then passing the Interstate 65/U.S. 31 intersection near Taylorsville. Riding with Thompson was his girlfriend, Debbie Thompson (now Miller). The pair had left a friend's trailer, where Gary had consumed three beers from about 8:40 P.M. to 10:10 P.M.

As the car proceeded south on U.S. 31, it was in the inside (or passing) lane next to the 48-foot grass median. Each lane of the four-lane highway was 12 feet in width.

Gary, driving at 60 to 65 miles per hour, was slowly passing and pulling away from another car which was in the outside lane. As Thompson's car

approached the southern of two exits/ entrances to the Amoco truck stop, located on the right (west) side of the southbound lanes, and in the southwest quadrant of the I-65/U.S. 31 interchange, Debbie noticed the side marker lights of a tractor cab near that exit but could not see the partially loaded flatbed trailer behind it. The tractor and trailer were owned and driven by Clyde Stephens and leased to the Jack Cole-Dixie Highway Company, a trucking company. The automobile continued toward the exit; Debbie then saw the trailer behind the tractor, and she suddenly realized that the trailer was blocking both lanes of the traveled portion of the highway. Debbie screamed; the car swerved to the right, but Gary was not able to maneuver very well due to the presence of the other car in the next lane. He slammed

on the brakes and the car skidded 97½ feet into and underneath the 40-foot flatbed trailer immediately behind the trailer's rear tandems. The side beam of the flatbed trailer struck Gary's windshield and left front windshield pillar, and these items then struck Gary's skull causing permanent brain and brain stem damage along with other permanent and disabling injuries.

The evidence established that U.S. 31 in the area in question is a dual-lane, limited-access, north-south highway, which intersects near Taylorsville with Interstate 65. At this intersection are located three high volume 24-hour diesel truck stops.

The Amoco truck stop, situated in the southwest quadrant of the I-65/U.S. 31 intersection, had two commercial "cuts," or exits/entrances, onto

southbound U.S. 31. When a truck exiting the Amoco truck stop headed north on U.S. 31, it first had to cross the southbound lanes, and, because the 48-foot crossover was not long enough to "shadow" or "store" the entire trailer while the driver waited for the northbound lanes to clear, he had to stop with the trailer blocking one or both of the southbound lanes of traffic while he waited for an opportunity to enter the northbound flow of traffic. Evidence established that these trucks often were loaded heavily and were slowly moving.

In July, 1973, the area where the accident occurred had no lighting. The crossover was located on a flat, gentle curve (bending left, or east, when southbound), and this curve made it difficult, especially at night, for southbound motorists before entering the curve to

discern whether a stopped tractor and trailer were on the Amoco driveway, were blocking the southbound lanes, or were in the crossover. At nighttime this problem was aggravated when a tractor with a flatbed trailer was blocking the southbound lanes, since this type of trailer would have very little side surface to reflect a southbound motorist's headlights. Given the average distance of 300 feet for the reach of an automobile's headlights, and given the absence of a reflection off the side of a flatbed trailer, a driver proceeding at the legal speed limit, heading into and around the curve, might not be able to see the trailer until it was too late to stop.

Expert testimony showed that the area lacked warning and caution signs which could have advised southbound

motorists of the dangers involved. There was one "Truck Entrance" sign which was 1,271 feet north of the crossover involved and 24 feet off the highway; thus it was also north of the northern exit/entrance to the Amoco truck stop, and expert testimony differed as to the sign's applicability to the crossover where the accident occurred. It was also questionable whether a southbound driver's headlights would illuminate the "Truck Entrance" sign, since it was so far (24 feet) from the highway. The positioning of this sign violated the State's Uniform Traffic Manual in at least two respects: 1) the sign was 24 feet from the road instead of 12 to 18 feet as required by the manual; and 2) the manual required that the sign be posted no more than 750 feet from the exit/entrance (compared with this sign's positioning 1,271 feet

from the crossover exit at which the accident occurred).

In 1973 the general highway speed limit in Indiana was 65 m. p. h. unless otherwise indicated on a particular stretch of highway. Evidence conflicted at trial concerning the speed limit near the crossover. Plaintiff's expert, Joseph Harris, testified that according to the Uniform Traffic Manual the speed limit was 65 m. p. h. despite the State's attempt to lower the speed limit by posting a single 55 m. p. h. speed limit sign over a mile north of the crossover.

Harris testified that he was familiar with the Indiana Uniform Manual on Traffic Control Devices and its federal counterpart. The maximum speed limit for a road such as U.S. 31 in this area was 65 m. p. h. in July, 1973. According to the manual, before a speed reduction

area is in effect there must be an absolute speed limit enacted by law pertaining to this area and there must be properly posted signs. For a speed reduction area of less than 5 miles in length, such as the attempted speed reduction in the area in question, the Uniform Manual required speed signs to be posted at least every one-half mile, and at the end of the zone it required a sign saying "Return to 65 m. p. h." or "End 55 m. p. h."; therefore, for a one-mile speed reduction zone, it was necessary to have a minimum of three signs. The manual also required a "Speed Limit Ahead" sign at least 1,000 feet before the speed reduction zone started with the "Begin 55 m. p. h." sign. Although all these signs were required to effect a reduced speed zone, the State had in place only one 55 m. p. h. speed limit

sign, which was located over a mile north of the crossover.

Since U.S. 31 was a declared limited-access highway, the Indiana State Highway Commission had control over the issuance of permits to allow the construction of cuts and driveways for businesses located near the highway. See Ind.Code 8-11-1-4.

Over the years several citizens had complained about the dangers of the intersection. From a review of the record it appears that the State's only response to these complaints was the placing of one 55 m. p. h. speed limit sign north of the intersection in 1973.

On October 5, 1964, Hildreth Smith wrote a letter to the State Highway Commission concerning the dangers of the I-65/U.S. 31 junction and noting that several fatal accidents and property

damage accidents had occurred in the area. She specifically referred to the problems caused by slowly moving trucks entering U.S. 31 from the truck stops at the intersection. She recommended the installation of caution lights, signs warning of slowly moving vehicles, or a reduced speed zone.

Wilamay Powell wrote to Governor Edgar D. Whitcomb on May 30, 1972, complaining about the trucks exiting the truck stops at the I-65/U.S. 31 interchange. She specifically informed the Governor that, as she drove north on U.S. 31 on that date, a slowly moving truck pulled out from one of the truck stops and blocked the northbound lanes while the driver waited to make a left turn onto the southbound lanes. Mrs. Powell almost ran into the trailer behind the tractor. That afternoon as

she was returning home, driving south on U.S. 31, a similar incident occurred, only this time the tractor-trailer pulled out of the Amoco truck stop and blocked the south bound lanes of traffic while waiting for the northbound lanes to clear. Again Mrs. Powell nearly ran under the truck's trailer.

Prior to Gary's accident, Bartholomew County Sheriff Jimmie McKinney had lodged complaints with the Indiana State Highway Commission concerning the area in which the collision occurred. On numerous occasions he had notified the local State Highway Commission in Columbus about the dangerous nature of the crossover where the accident occurred. To his knowledge the State took no action in response to his complaints.

On November 1, 1972, Marta Cuenca witnessed an accident at this same

crossover, again caused by a truck blocking the southbound lanes because the driver could not store his trailer in the crossover. Mrs. Cuenca wrote a letter complaining of this situation to The Republic, a Columbus newspaper, and forwarded copies to the Governor, the Indiana State Highway Commission, the State Police, and the Bartholomew County Sheriff's Department.

In November, 1972, Robert D. Garton, a State Senator, informed in writing Dave Waggoner, then executive secretary of the Indiana State Highway Commission, that there was a problem with the intersection and especially with the median crossovers which did not allow enough space to prevent trucks from blocking lanes of traffic as they attempted to negotiate left turns when leaving the truck stops. Garton received a response

from the Highway Commission saying that the Commission would look into it.

Concerning the injuries received by Gary, it is unnecessary to detail their precise extent and nature. Expert testimony established that he was suffering from post-traumatic encephalopathy with epileptiform tendencies. This condition is permanent. He has severe balance and seizure problems which make him virtually umemployable [sic]; on the other hand, Gary is expected to have a near normal life expectancy.

By Gary's 21st birthday his medical expenses were $37,906. Expert testimony established that the present value of Gary's future lost earnings was $533,000. Convalescent care will cost Gary from $700,408 to $1,260,735. These damages were exclusive of pain and suffering and any future medical expenses.

I.

The State first contends that it has residual sovereign immunity, even after our Supreme Court's decision in Campbell v. State (1972), 259 Ind. 55, 284 N.E.2d 733, and that such residual immunity shields the State from liability for design defects in State highways. This contention already has been decided adversely to the State in the case of Indiana State Highway Commission v. Clark (1978), Ind.App., 371 N.E.2d 1323, a case in which the State made a similar argument, and in which this court stated, at 1327:

> "As is evident from the quote in its brief, supra, the State has misconstrued the respective meanings of private duty, public duty and discretionary act. In Elliott v. State (1976), Ind.App., 342 N.E.2d 674 this court held that the State has a general duty to exercise

> reasonable care in designing, constructing, and maintaining its highways for the safety of public users. Therefore, as a result of the holdings in Campbell, supra, Briggs [Board of Commissioners of Delaware County v. Briggs, (1975) Ind.App., 337 N.E.2d 852] and Elliott, supra, sovereign immunity is not available to the State as a defense, and where the State has breached its duty of reasonable care, the State is liable for the damages which were proximately caused by that breach."

Having reaffirmed the principle that the State has a duty to exercise reasonable care in constructing, designing and maintaining its highways, and that there is thus no doctrine of residual sovereign immunity to protect the State from its negligent acts in connection with this duty, we can proceed to determine whether the State is to be held liable in the instant case.

II.

The State next alleges that, even assuming arguendo that it was negligent, there was insufficient evidence produced at trial to prove that it was the proximate cause of Thompson's injuries. The State's position is that, even if the State were negligent in the signing, positioning of speed limits, lighting, designing and maintaining of the section of U.S. 31 in question, such negligence "merely furnished a condition by which Gary Thompson's injuries were made possible," and thus the real proximate causes of Thompson's injuries were 1) his failure to use reasonable care for his own safety; and 2) the actions of the truck driver.

The question whether the defendant's conduct caused the plaintiff's injury is a question of fact. Meadowlark Farms, Inc. v. Warken (1978), Ind.App., 376 N.E.

2d 122. In determining the question whether there was sufficient evidence to support the jury's verdict on the issue of proximate cause, this court neither weighs the evidence nor judges the credibility of witnesses; rather, we examine that evidence, and logical inferences therefrom, supportive of the verdict, to determine whether there is sufficient evidence on each element of the plaintiff's case. Meadowlark Farms, supra.

Concerning the question of adequate evidence of proximate cause, it has been noted that:

> "A cause is a necessary antecedent: in a very real and practical sense, the term embraces all things which have so far contributed to the result that without them, it would not have occurred. It covers not only positive acts and active physical forces, but also pre-existing passive conditions which have played a

material part in bringing about the event." W. Prosser, The Law of Torts, 237 (4th Ed. 1971).

At times many causes will influence a result, but as a matter of public policy courts limit liability for negligent acts to the conduct which proximately caused the injury. Factual causation becomes proximate causation under the test of foreseeability. Swanson v. Slagal (1937), 212 Ind. 394, 8 N.E.2d 993; State v. Dwenger (1976), Ind.App., 341 N.E.2d 776; Meadowlark, supra.

In Meadowlark it is stated, at 129:

"One's negligence may furnish a mere condition for the incidence of another's negligence and allow the original actor to escape liability. Schroer v. Funk & Sons, Inc. (1968), 142 Ind.App. 223, 233 N.E.2d 680; Slinkard v. Babb (1953), 125 Ind.App. 76, 112 N.E.2d 876. If true, such negligence was not the active or efficient cause of the resulting injury. However, the

> ultimate test of legal proximate causation is the reasonable foreseeability. The assertion of an intervening, superseding cause fails to alter this test. City of Indianapolis v. Falvey (1973), [156 Ind. App. 366], 296 N.E.2d 896. For this Court to affirm a positive finding of proximate causation, we need only conclude that the evidence presented supports a reasonable conclusion that the original wrong was one of the proximate rather than remote causes." (Original emphasis.)

Furthermore, when a defendant has been shown to have knowledge that independent and intervening forces might occur and result in damage or injury due to the effects of the defendant's negligence, he cannot escape liability by claiming that the specific manner in which the damage or injury occurred was foreseeable. Johnson v. Bender (1977), Ind.App., 369 N.E.2d 936.

At trial there were over 1,200 pages of testimony from 29 witnesses; there were also numerous exhibits. We will not attempt to detail all evidence establishing the element of proximate cause. We believe that the following testimony of plaintiff's witness, Joseph Harris, in connection with the facts set out supra, presents a prima facie case of negligence from which the jury was allowed to infer that the State was the proximate cause of Thompson's injuries:

"Q. . . . Mr. Harris, do you have an opinion as to whether any or all of these deficiencies and problems in the area that you've talked about, whether they proximately caused or contributed to the collision of July 17, 1973 involving Gary Thompson?

A. Yes, Sir, I do.

Q. Would you state your opinion to the Jury, Sir?

A. They did. The signing problem contributed in that it didn't warn of the presence of a truck, of the presence of crossing trucks, of the presence of the curve, of the presence of the intersection itself. The lighting problem meant that the driver of the car, uh, was so close to the intersection by the time he recognized that there was a flatbed trailer there that there was nothing anymore he can do to avoid it. He can't steer to avoid it, he can't brake to avoid it, he cannot avoid it. Had this area been properly lighted you would be given [sic[the driver of—of the car, instead of demanding that he take two and a half seconds to perceive and react to what's there, exclusive of any decision, you change that time to, uh, uh, less than a third, to three-quarters of a second, which means that you make it, uh, highly likely that

now he'll stop if you've changed nothing else in this area but given him the ability to see what's there. Thirdly, if you eliminate the storage problem or you control it, which is really the basic problem, you can't store the trucks, surely you eliminate this kind of accident. The reason for going to traffic controls, the reason for going to proper signing, when you—when you're dealing with very large, long vehicles, slow moving vehicles, is you must eliminate the—the—the dangers that they impose, which is really blocking on-coming high speed traffic. So, if you get rid of these problems you get rid of this accident.

Q. Mr. Harris, do you have an opinion as to whether Gary Thompson or the truck driver or both of them could have avoided this collision?

A. Yes, I do.

Q. Would you state that opinion to the Jury, please?

A. Once that truck begins to move, uh, there's nothing more that that truck driver can do. No matter what he does, he can't do it fast enough. He can't get that truck anywhere in, to hide it, it's too big to hide. He can't get it into the median. It won't even fit. But he can't get it out of the way. More particularly he certainly can't change the—the—the lighting on the side of the trailer, which isn't particularly visible, but once he starts to go his actions are irrevocable. He's putting a barrier across that road and there's nothing he can do to get it out of the way in time. And if you look at the driver of the car, the driver of the car somehow has to know that there is a hidden low flatbed trailer behind that cab, he can see the cab, 800-700 feet

> away, but he can't see that flatbed trailer, and if you're asking should he have been able to see it, no, not if he's an ordinary person. And there's then nothing he can do when he finally does see it and react to it, and he surely reacts. He reacts, he steers and he brakes and you can't ask more of—of the ordinary driver of a car other than steering and braking. He braked as hard as he could and he obviously steered hard. There is no way he can avoid this accident because you haven't told him—you haven't signed properly, you haven't lit the area properly and you haven't provided any storage facility for that truck. So, once that truck begins to move this accident is—is irrevocable."

The jury was free to believe or disbelieve any or all of the testimony of Harris and plaintiff's other witnesses.

We hold that in view of this testimony and all the facts set out *supra*, and especially in view of the fact that the State had several prior warnings about the extremely dangerous condition of this stretch of highway but ignored the problem, the jury was justified in finding that the State could well have foreseen the consequences of its actions and consequently that the actions complained of were the proximate cause of Thompson's injuries.

We are not prepared to dictate to the State the precise manner in which it could, or should, have attempted to remedy the situation. The State declares in its brief that "at the time of the accident the State, though having the power of eminent domain, had no right under the law to prevent the use of the private drive nor sever the right of

ingress and egress to the Standard [Amoco] Truck Plaza without payment of just compensation . . ." The State apparently argues that when it was confronted with prior warnings of the dangers of this intersection, it was faced with either 1) closing the truck stops entirely, in which case it argues that it would have had to condemn this property under state eminent domain procedures; or 2) doing nothing at all, which it did.

We decline to adopt this simplistic approach and we doubt that the State was required, under the "reasonable man" standard, to condemn the truck stops. The duty imposed upon the State was to act reasonably under the circumstances. Many alternatives could have been attempted to mitigate the dangers of this area. First, there was the possibility of lighting it or posting signs to warn of the

curve, the truck entrance, the median crossover, or slowly moving vehicles. An automatic traffic control device might have been installed. A caution light or sign could have been erected. The State could have lowered the speed limit in the area in question by complying with its own manual in the posting of speed limit signs. Additionally, the permit application, whereby Amoco received permission to construct the entrance in question, provided as follows:

> "The permittee [Amoco] shall remove or relocate any such entrances or approaches when requested to do so by the Commission in the interest of safety to highway traffic. . . . Permits issued for driveway entrances and approaches may be rescinded at any time by the Indiana

State Highway Commission. . . ."

The State has offered no reason why this provision could not have been invoked to require Amoco to redesign its entrance. Indeed, without so holding, we believe the State has extensive powers in regard to the redesigning of entrances of limited-access highways. Ind.Code 8-11-1-4 provides, inter alia, that the Highway Commission may:

> ". . . regulate, restrict or prohibit access as to best serve the traffic for which such [limited-access] facility is intended . . . No person shall have any right of ingress or egress . . . except at such designated points at which access may be permitted, . . ."

See also Ind.Code 8-11-1-7, which gives the State the power to eliminate intersections for purposes of safety upon limited-access highways.

Finally, in connection with the plaintiff's allegation that the State was negligent in its design of the area in question, we note the fact that considerable testimony was directed to the proposition that the truck driver could not "store" or "shadow" his trailer in the crossover when he pulled out of the truck stop. Significantly, when Amoco first designed the exit/entrance in question in its application for a permit, Amoco's design called for the construction of a new, obliquely-angled crossover which would have stored completely the length of the tractor and trailer in the present case. That design was rejected by the State, and the eventual location of the exit/entrance was immediately across from an existing, right-angled median crossover. Additionally, this exit/entrance was placed further into the curve in accordance with

the State's suggestions.

Again, we do not wish to dictate to the State which measures mentioned supra it should have employed to meet its duty of reasonable care under the circumstances. However, we hold that evidence of the State's failure to attempt any of these remedies, other than in a half-hearted manner, was sufficient evidence from which the jury could find that the State had breached its duty, and that this breach was the proximate cause of Thompson's injuries.

III.

The State next contends that, even assuming negligence and proximate causation on the part of the State, Thompson is barred from recovery because the evidence shows that he was contributorily negligent as a matter of law. The State argues that the following facts establish

such contributory negligence: first, there was a "Begin 55 m. p. h." sign over a mile north of the crossover. However, the State's argument does not mention the fact that pursuant to its own traffic manual the speed zone created by this solitary sign, if in fact there was one created, extended for only one-half mile from the sign. Thus it ended over three-fourths of a mile north of the crossover where the accident occurred.

The State next asserts that Thompson's consumption of three beers beginning at 8:40 that night was a sufficient demonstration of his contributory negligence. The State ignores, however, the evidence which showed that Thompson's blood alcohol content was .04 percent at the time and that this figure was well below the .10 percent at which a person statutorily is presumed to be intoxicated. Ind.Code 9-4-1-56(2).

The question of contributory negligence is a question of fact for the jury. Only when it can be said as a matter of law that no reasonable man would have acted as plaintiff did under the circumstances does the issue of contributory negligence become an issue to be decided by the court. Meadowlark Farms, Inc. v. Warken (1978), Ind.App., 376 N.E.2d 122.

The evidence at trial differed as to the reasonableness of Thompson's actions on the night of the accident. However, we believe that the evidence falls far short of the quantum necessary for this court to hold, as a matter of law, that Thompson was contributorily negligent. That question was properly left to the jury.

IV.

The State next argues that, even assuming its negligence, its proximate

causation and a lack of contributory negligence on the part of Thompson, the State is liable for a maximum of only $300,000 under the provisions of the Indiana Tort Claims Act, Ind.Code 34-4-16.5-1 et seq.

The timing and sequence of events in the case at bar present the question whether the legislature has limited a tort claimant's recovery against the State to $300,000 in cases accruing before the effective date of the Tort Claims Act. The sequence of events is as follows:

1) On July 17, 1973, the accident occurred;
2) On September 20, 1973, Thompson filed his complaint;
3) On February 19, 1974, the Tort Claims Act, which limits recovery from the State to $300,000 for any one occurrence, became effective; and
4) On July 20, 1976, judgment was entered in favor of Thompson.

Thus the injury and the filing of the complaint occurred prior to the effective date of the Act, but the judgment was rendered after that date.

This precise question has yet to be decided in Indiana, but we believe that State v. Daley (1975), Ind.App., 332 N.E.2d 845, is helpful in understanding the issues involved.

In Daley the plaintiff's loss and his acquisition of a judgment occurred prior to the effective date of the Act: however, he sought to enforce the judgment after the Act became effective. The State argued that the Act was to be read retroactively, and that the plaintiff therefore could not recover above $300,000.

Our court first decided that the Act was not to be read retroactively, and it said, in 332 N.E.2d at 848:

"The section limiting recovery is

> silent as to retroactivity, and the appropriations section does not say that claims 'which have been . . . obtained' are limited to $300,000. Indeed, the Attorney General has the duty to present vouchers for past and present claims, and there is nothing expressed or implied that said vouchers should be limited to $300,000. We conclude that the Act should be read to mean that appropriations have been made for past judgments in full, but that claims obtained after February 19, 1974, will be limited by the Act to the amount stated therein." (Emphasis in the original.)

Throughout the Act there is a distinction between "claims" and "judgments". For example the Act states that "[t]here is hereby appropriated from the general fund of this state sufficient funds to settle claims and to satisfy tort judgments . . ." Also, one seeking to recover from the State first must give notice of his "claim" prior to filing suit.

Keeping this distinction in mind in in examining the Daley case, it is clear that the statement "but that claims obtained after February 19, 1974, will be limited" implies that claims obtained prior to February 19, 1974, are not subject to the limitation of the Act. In view of the distinction drawn between the terms "claims" and "judgments" throughout the Act and in Daley, we hold that Thompson "obtained" his claim at the time of the accident and thus is not subject to the limitation of the Act.

It has long been the public policy of this State to insure that every aggrieved citizen has a full and complete opportunity to present his case in court. In the instant case, Thompson's accident and injuries presented legal and factual issues of tremendous complexity; the preparation of this case understandably consumed many months. Were we to hold that his failure

to race to judgment before February 19, 1974, precluded his recovery of more than $300,000, we would be encouraging the hasty and slipshod preparation of difficult cases. Additionally, proper preparation of the State's case would have extended beyond the crucial February 19, 1974 date. Thus, in view of the language of the Act, the decision in Daley, supra, and our policy favoring the opportunity for every party to prepare its case fully, we hold that "claims obtained" prior to the date of the Act are not limited to a recovery of $300,000, regardless of the date on which judgment is entered.

V.

The State next contends that the trial court erred in 1) "recognizing" the loan receipt agreement between the Thompsons on the one hand, and the truck driver and owner (Jack Cole defendants) on the other;

and 2) granting plaintiffs' motions in limine to exclude all evidence of such agreement.

Under the terms of the loan receipt agreement, which was filed with the trial court prior to trial, the Thompsons were to prosecute their claims against the State of Indiana and to dismiss with prejudice their case against the Jack Cole defendants. In consideration of this agreement the Jack Cole defendants loaned the Thompsons $225,000; the Thompsons agreed to repay this amount, without interest, only to the extent they successfully collected on their claim against the State; failing recovery from the State, the Thompsons would not repay the loan.

The State first argues that to allow the use of such agreements would be to allow contribution or indemnity among joint tort-feasors, contrary to Indiana law; thus, according to the State, the trial court "erred in recognizing the agreement . . ."

We disagree with the State's position, and we hold that the agreement in question was neither contribution among joint tort-feasors nor was it indemnity.

Loan receipt agreements have been held valid in Indiana as early as the decision in Klukas v. Yount (1951), 121 Ind.App. 160, 98 N.E.2d 227. Since the decision in that case there has been a series of cases discussing, and approving, loan receipt agreements as a means of settling litigation prior to trial. See Northern Indiana Public Service Company v. Otis (1969), 145 Ind.App. 159, 250 N.E.2d 378, 385-393; American Transport Company v. Central Indiana Railway Company (1970), 255 Ind. 319, 264 N.E.2d 64, 65-67; Scott v. Krueger (1972), 151 Ind.App. 479, 280 N.E.2d 336, 339, 350-358; Burkett v. Crulo Trucking Co., Inc. (1976), Ind.App., 355 N.E.2d 253, 258-261; City of Boomington [sic] v. Holt (1977), Ind.App., 361 N.E.2d 1211,

1214-1217, and Geyer v. City of Logansport (1977), Ind., 370 N.E.2d 333, 337-338. In view of the holdings of these cases we do not need to discuss further the court's action in regard to "recognizing" the loan receipt agreement; we also decline the State's invitation to reverse or modify the above decisions. However, whether the agreement should be admitted into evidence, as the State contends, is a question which has not been settled in this State, at least in connection with facts similar to those in the case at bar.

The State first argues that, upon execution of the agreement between the Thompsons and the Jack Cole defendants, the latter became real parties in interest and their presence as such should have been revealed to the jury. See Ind.Rules of Procedure, Trial Rule 17(A). However, this agreement is essentially only a different version

of the situation in Klukas, supra, in which this point was decided adversely to the State's present position. In the Klukas case the plaintiff-appellee was a passenger in defendant-appellant's taxicab when it collided with another car whose driver was insured by an insurance company which sought to, and did, secure an out-of-court settlement with the plaintiff via a loan receipt agreement. Under that agreement the plaintiff-appellee was to repay the insurance company only to the extent of his recovery against the taxi owner, or the amount of the loan; whichever was less. The appellate court rejected the defendant-appellant's arguments that the insurance company thereby became the real party in interest, or that the insurance company was subrogated to the plaintiff-appellee's claim against the defendant taxi owner. We find this case controlling and hold that the Jack Cole

defendants in the case at bar did not become the real parties in interest; it follows then that we need not discuss the assertion that their status as such was required to be revealed to the jury.

There remains, however, the question whether the trial court erred in refusing to allow the agreement into evidence to impeach the credibility of certain witnesses. Apparently this question has not been decided in Indiana.

We agree with those foreign cases which hold, as a general proposition, that when a loan receipt agreement is executed between a plaintiff and a defendant, and that defendant, or one of his agents or representatives, appears at trial and testifies for the plaintiff, the loan receipt agreement should be admissible to impeach his testimony. That such a witness would have a pecuniary bias is obvious, for if he

testifies persuasively in plaintiff's favor, he will be more likely to recover his loan to the plaintiff. As stated by the Supreme Court of Illinois in Reese v. Chicago, Burlington & Quincy Railroad (1973), 55 Ill.2d 356, 303 N.E.2d 382, at 387:

> "Defendant Koehring [not a party to the loan receipt agreement] argues that the use of loan agreements tends to undermine the adversary nature and integrity of the proceedings against the remaining defendant. To a limited extent, we agree. It seems not unlikely that, where a defendant has executed a loan-receipt agreement with a plaintiff who thereupon dismisses that defendant and proceeds against the remaining ones, the employees and witnesses of the dismissed defendant may be substantially more co-operative with plaintiff than would otherwise be true, since any recovery by that defendant of the loaned amount is frequently contingent upon plaintiff's success against the remaining defendants. To some degree the same may

be said of many third-party actions. But we believe adequate protection for those defendants exists if by cross-examination they are permitted to establish that a witness knows of the existence of a loan agreement, and if so, that the witness may be biased or prejudiced as a result thereof. In the event that the existence of such agreement is established, an appropriate instruction limiting the effect of the admission into evidence of the loan-receipt terms might be given at the request of any party."

See also Bedford School District v. Caron Construction Company (1976), 116 N.H. 800, 367 A.2d 1051, and Klotz v. Lee (1955), 36 N.J.Super. 6, 114 A.2d 746.

In the Bedford School District case it is noted, at 1054, that:

". . . full disclosure to the jury may be prejudicial to the non-agreeing defendant. The very existence of the agreement may suggest to the jury that at least one defendant feels that the plaintiff should

recover and that the nonagreeing defendants should pay. [Citations omitted.] Also, knowing that the agreement will be presented to the jury, the parties might fill it with self-serving recitals that inculpate the nonagreeing defendant. [Citations omitted.] Full disclosure might also unduly prejudice the plaintiff. For example, if the jury is told the amount which the defendant agreed to pay, it might erroneously conclude that the sum is the plaintiff's estimate of his damages. Thus, many courts have refused to permit disclosure of the dollar amount of 'Mary Carter' agreements. [Citations omitted.] Even though the South Dakota Supreme Court was aware of the evils of such agreements and advocated disclosure of most of their details, it stated: 'We can visualize no circumstances where the amount involved in a release or covenant need be disclosed (to) the jury.' Degen v. Bayman, 200 N.W.2d 134, 139 (S.D.1972); See Moore v. Young, 263 N.C. 483, 139 S.E.2d 704 (1965). The

plaintiff also might be prejudiced if the agreement is admitted substantively as evidence of liability because the jury might conclude that the responsible party has already come forward and settled and, if the other defendants were liable, they would have settled too. The final aspect of the disclosure problem is that admission of these contracts into evidence tends to discourage settlements, contrary to public policy. [Citations omitted.] A party is not likely to enter into a settlement if the agreement may be admitted before the jury as evidence of his liability. C. McCormick, The Law of Evidence § 274 (2d ed. 1972). Those cases that have considered the matter have held that the 'Mary Carter' type agreement is admissible only for the purpose of impeaching the testimony of the agreeing party. Reese v. Chicago, Burlington & Quincy R.R. Co., 55 Ill.2d 356, 364-65, 303 N.E.2d 382, 387 (1973); see Pellett v. Sonotone Corp., 26 Cal.2d 705, 160 P.2d 783 (1945)." (Emphasis added.)

It should be stressed, however, that in the case at bar none of the Jack Cole defendants (or their agents or representatives) appeared at trial and testified; accordingly, we must deal only with the question whether the agreement could be used to impeach the testimony of witnesses other than those connected with the Jack Cole defendants.

The State contends that the agreement should have been admitted to impeach the Thompsons' testimony, for in executing the agreement they became "contractually interested" in the outcome of the case; the State therefore implies that the existence of the agreement gave the Thompsons such an additional interest in winning their case, and in obtaining a large judgment in order to meet the obligations under the agreement and still have a large sum for themselves, that they necessarily slanted

their testimony. We find this reasoning unpersuasive.

More logically, it would appear that a party seeking monetary damages in tort for his injuries is understandably interested in getting as large a recovery as possible; obviously he need not have a loan receipt agreement with a dismissed defendant before he becomes biased in favor of his own case. The additional bias, if any, that such an agreement may produce is not such an inherent danger that the agreement must be shown to the jury. We believe that the jury would be more likely to be misled or confused by the introduction of the agreement. Therefore, we hold that the Thompsons' interest in the loan receipt agreement was not so great that their testimony necessarily would be biased to such an extent that the admission of the agreement into evidence would be warranted. We

find this holding to be consistent with those well-reasoned decisions from other jurisdictions which have considered similar problems, Reese, supra, and Bedford School District, supra, as well as with the only Indiana decision which has approached similar issues.

In City of Bloomington v. Holt (1977), Ind.App., 361 N.E.2d 1211, where the existence of a loan receipt agreement had been revealed to the jury through an instruction, this court stated, in response to appellant's argument to the contrary, that it saw no reason why the amount of the settlement contained in the agreement should be revealed to the jury. The issue was not squarely decided, however, due to the appellant's waiver of it on appeal. Our decision in the case at bar is consistent with the rationale of the Holt case.

Accordingly, the trial court committed no error when it granted plaintiffs' motions in limine to prevent the admission into evidence of the loan receipt agreement.

VI.

The State next alleges that the trial court erred in excluding from evidence the agreement entered into between the Thompsons and certain defendants whereby the Thompsons agreed not to execute against those parties. The substance of this agreement, dated July 17, 1975 was that the Jack Cole defendants would reveal to the Thompsons certain unnamed persons or entities, and legal theories assertable against them, which might enable the Thompsons to recover a judgment in a significant amount. In return for this the Thompsons agreed not to execute any forthcoming judgment against the Jack Cole defendants prior to complete exhaustion of all appeals and remedies in

execution of any judgment against the State. This agreement was executed approximately one year before trial and, upon its execution, copies immediately were sent to all parties and to the court. Ultimately the Thompsons decided not to pursue the defendants and legal theories revealed by the Jack Cole defendants pursuant to this agreement.

The State contends that this agreement "casts a cloud" on the Thompsons' lawsuit, and that it shows how "desperate" the plaintiffs were to recover. This "desperation," argues the State, reflects on the plaintiffs' credibility, and thus the agreement should have been allowed into evidence to impeach the plaintiffs' testimony. Finally, in an argument similar to that posed under issue V, supra, the State contends that by the execution of this agreement the Thompsons' financial interest

in the result of this case became so acute that they necessarily distorted their testimony.

Significantly, the State has not been able to cite any authority which holds that such agreements are relevant to either the substantive issues of the case or the credibility of any witness. We agree with the State that the general rule regarding the admissibility of facts in connection with the impeachment of a witness' testimony is that any fact which tends to reflect upon the veracity of that testimony may be introduced to impeach the witness. Acker v. State (1959), 239 Ind. 466, 158 N.E.2d 790. However, we hold that the effect, if any, which this agreement would have had on the testimony of the Thompsons is too speculative and tenuous to justify the potential confusion the introduction of this agreement could have had among the

jurors. As noted above, the other parties to the agreement were dismissed and did not testify at trial; thus the agreement presents no issue as to the credibility of those parties.

We therefore hold that the trial court committed no reversible error in excluding this agreement from evidence.

VII.

The State next contends that the misconduct of a juror necessitates the granting of a new trial of this cause. The misconduct alleged is that a certain juror, a Mr. Wathne, had been a client of a law partner of one of the Thompsons' attorneys at trial, Tom Jones. The State argues that Mr. Wathne's failure to reveal this relationship to the State during voir dire was prejudicial to the State and requires a new trial.

The transcript of the record of voir dire shows that Mr. Wathne was seated in the jury box during the time the following remarks were made to the jury by plaintiffs' counsel, Mr. Jones:

> "MR. JONES: Good morning, ladies and gentlemen. My name is Tom Jones, I'm a practicing attorney here in Franklin, Indiana. I practice with the law firm of Jones, Foster and Loveall, up here on Main Street. I'm one of the attorneys who represents the Plaintiffs in this case, Mr. Gary Thompson . . ."

On later voir dire, Mr. Jones asked Mr. Wathne:

> "Q. Now, do you know, excuse me, any of the attorneys or the parties in this case?
> A. . . ." [Evidently no response from the proposed jurors.]

When the jury was passed to the State it questioned:

"Q. Mr. Jones may have covered this individually in his questions to you; but in the event that he didn't, let me ask you this question, addressing it to all of you at the same time. Do any of you know any of the parties or their attorneys in this case, and if so, raise your hands."

Again, Mr. Wathne made no response to this question.

In its motion to correct errors the State included certified copies of certain records of the Franklin City Court which showed Mr. Wathne had been represented in that court in two separate traffic cases by Kenard Foster, who was once a law partner of Tom Jones.

It is the State's position that these facts demonstrate that it was denied a fair trial by an impartial jury. Specifically, argues the State, had it known of the lawyer-client relationship existing between

Mr. Wathne and the partner of Mr. Jones, it would have used a preemptory [sic] challenge to exclude Mr. Wathne.

We agree with the State that failure of a juror to disclose information solicited by counsel on voir dire is available grounds for a new trial. Cleveland, C., C. & St. L. Ry. Co. v. Osgood (1905), 36 Ind.App. 34, 73 N.E. 285, as modified by Stevens v. State (1976), 265 Ind. 396, 354 N.E.2d 727, and Johnston v. State (1958), 239 Ind. 77, 155 N.E.2d 129. However, we disagree with the State in its assumption that the witness withheld information directly solicited by counsel.

It is standard practice on voir dire for counsel to ask prospective jurors whether they know any of the parties, their attorneys, or their attorneys' associates in the particular case at issue. Obviously should any of the jurors be acquainted

with any of the persons in these categories it would be in the interest of all parties to know of this in order to exercise either their right to challenge a juror for cause or peremptorily. However, the State in the case at bar did not phrase its question in a manner to include all the groups mentioned above, for the State asked, "Do any of you know any of the parties or their attorneys in this case, . . ." We have not been directed to any portion of the record which would show that the question concerning parties' attorneys' associates ever was before the jury. We therefore hold that the failure of Mr. Wathne to inform the State that he had been represented at one time by a partner of Mr. Jones does not constitute reversible error in view of the State's failure to pose a precise question to that effect.

We further hold that the State has demonstrated no material misconduct which would have had any effect upon the verdict. Homestead Farms, Inc. v. State (1976), Ind. App., 343 N.E.2d 822.

VIII.

The State next contends that the damages awarded by the jury were excessive, and that the jury was motivated by prejudice, passion, partiality or corruption. The State's argument proceeds along two lines: 1) that the jury returned a $1,240,000 verdict for Gary Thompson while returning no verdict at all for Gary's father who had shown special damages in the amount of $37,960; and 2) that this is the largest personal injury verdict entered to date in Indiana. We find no merit whatsoever in either of these arguments.

Regarding the proposition that the jury's failure to return a verdict for

Gary's father "indicates a spoiled jury returning a sympathy verdict," we note that the State has failed to direct our attention to any authority which would support the notion that the failure of a jury to return a verdict for one plaintiff automatically vitiates as excessive the verdict returned for the other plaintiff. The conclusion is simply a non sequitur of the proposition.

Turning to the correct way to determine whether a verdict is excessive, we first must reconsider the evidence introduced at trial. It showed the following expenses incurred or to be incurred as a result of the accident.

Present value of Gary Thompson's future lost wages (date of trial to end of work-life expectancy, 38.8 years)	$ 533,856.00
Present value of the cost of future custodial care (date of trial to end of 47.8 years of additional life expectancy)	$ 700,408.00

Gary Thompson's past medical expenses incurred from his 21st birthday to trial date	$ 12,705.91
Two years' past lost wages (8-15-74 to 8-15-76)	$ 17,108.00
Total	$1,264,077.91

Thus Gary's special damages, as proven in the trial court, were in excess of the $1,240,000 verdict without even considering the questions of pain and suffering or disfigurement.

In State v. Daley (1972), 153 Ind.App. 330, 287 N.E.2d 552, this court stated, at 556:

> "For a formula then, our common law sets only the general guidelines for compensating the victim, each in its own way to be considered by the trier of facts and weighed to determine what the total compensation will be. Because of this personal nature of each case and since the decision is unique to the particular set of facts our courts have said the trier of facts is to be given 'sound discretion,' and 'liberal discretion'

where damages cannot be defined and calculated with mathematical certainty or by any exact standard. [Quoting Kavanagh v. Butorac, (1967) 140 Ind. App. 139, 221 N.E.2d 824.] An awareness of general inflation and a constant depreciation and cheapening of money is within the zone of discretion given to the trier of facts when assessing damages. New York Central Railroad Co. v. Johnson (1955), 234 Ind. 457, 127 N.E.2d 603; Hahn v. Moore (1956), 127 Ind.App. 149, 133 N.E.2d 900, 134 N.E.2d 705; [Citation omitted].

In order to justify a reversal on grounds of excessive damages, the amount of damages assessed must appear to be so outrageous as to impress the court as being motivated by passion, prejudice and partiality. [Citations omitted.]

Reversal is not justified, however, if the amount of damages awarded is within the scope of the evidence before the court. Northern Indiana Public Service Co. v. Otis, supra;

First Bank & Trust Co. of South Bend v. Tellson (1954), 124 Ind.App. 478, 118 N.E.2d 496." (Original emphasis.)

We hold that the evidence presented at trial amply supports the verdict. Accordingly the State has presented no reversible error on the subject of the amount of the jury's verdict.

IX.

Finally, the State contends that the trial court erred in sustaining Amoco's T.R. 12(b)(6) motion to dismiss the State's third-party complaint filed against it. The State contends that it has a valid claim against Amoco for indemnification for any amount the State may be forced to pay in the present case. The State's complaint against Amoco reads in pertinent part as follows:

"1. That on or about July 18, 1967, the American Oil Company, submitted an application for a

permit to construct a driveway entrance and approach, Number 58126, for a driveway and approach located on State Road 31, Section G3, 0.5 miles north of the City of Taylorsville, County of Bartholomew, State of Indiana, at the U.S. 31 and I-65 Interchange on the west side of U.S. 31 in the southwest quadrant thereof. . . .

2. That on or about January 18, 1968, said application was accepted and approved by the Indiana State Highway Commission.
3. That said application No. 58126 included the following provisions: '(n) The permittee shall assume all responsibility for any injury or damage to persons or property resulting directly or indirectly from the construction of any approach or driveway.'
4. That said application No. 58126 was for construction of a driveway to be used as a commercial entrance for the American Oil Company Truck Stop and Gasoline

Station, located at State Road 31, Section G3, 0.5 miles north of the City of Taylorsville, County of Bartholomew, State of Indiana at the U.S. 31 and I-65 Interchange on the west side of U.S. 31 in the wouthwest quadrant thereof.

5. That the original plaintiffs, Gary D. Thompson and Paul C. Thompson have alleged negligent acts and ommissions [sic] of defendant, State of Indiana, and the Indiana State Highway Commission at the location given, supra.
6. That the responsibility for any injury or damage to persons or property resulting from said driveway at said location was that of the American Oil Company as per paragraph (n) of Application No. 58126, supra.
7. That if defendant, State of Indiana, is held liable to plaintiffs and is obligated to pay plaintiffs any damages or judgments resulting from their complaint, the American Oil Company must be required by

> the terms of its contractual agreements and by reason of all other applicable implied and common law indemnity, to indemnify, hold harmless and pay all these sums on behalf of the defendant, State of Indiana.
>
> WHEREFORE, defendants, and third-party plaintiffs, State of Indiana and Indiana State Highway Commission, pray that this third-party complaint be granted and the American Oil Company, Inc. be brought in as a third-party defendant and for all other proper relief."

Concerning the correctness of the trial court's granting of a T.R. 12(B)(6) motion to dismiss, we must stress again that this court will sustain such a dismissal only when the complaint shows on its face that the plaintiff is not entitled to relief. As our Supreme Court said in State v. Rankin (1973), 260 Ind. 228, 294 N.E.2d 604, at 606:

"This court has noted that in a typical 12(B)(6) situation, a complaint is not subject to dismissal unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts. [Citations omitted.] The rules do not require that the complaint state all the elements of a cause of action. It must be remembered that our new rules are based on so-called notice pleadings in which a plaintiff essentially need only plead the operative facts involved in the litigation. Other means less drastic than dismissal of the action can be used to clarify the theory and basis for the cause of action. Among these are a Motion for a more definite statement under TR. 12(E), our very broad discovery rules, and the pretrial conference under TR. 16(A)(1). We might note that certain cases from the Court of Appeals apparently state that the plaintiff is required to state in his complaint the theory upon which his claim is based. See, for instance, Cheathem v. City of

> Evansville (1972), [151] Ind.App. [181], 278 N.E.2d 602. Although a statement of the theory may be highly desirable, it is not required. When no evidence has been heard or no affidavits have been submitted, a 12(B)(6) motion should be granted only where it is clear from the face of the complaint that under no circumstances could relief be granted. The above stated principles concerning TR. 12 (B)(6) generally are equally applicable to a TR. 17(A) real party in interest objection brought under Tr. [sic] 12(B)(6)." (Original emphasis.)

With this standard in mind we approach the issue whether the State has presented a sufficient complaint to withstand a T.R. 12(B)(6) motion. We conclude that it has not.

Although Amoco has presented several theories to justify its position that the State is, as a matter of law, not entitled to relief against it, we shall only

discuss the question whether the contract on which the State relies in its attempt to impose an indemnity obligation upon Amoco is sufficient to do so. We hold that the language of this contract, contained in the permit application by which Amoco sought approval of its plan for a "cut" in the highway is insufficient to create an indemnity obligation under Indiana law.

First, it should be noted that "when any pleading allowed by these rules is founded on a written instrument, the original, or a copy thereof, must be included in or filed with the pleading." T.R. 9.2 (A). This the State correctly has done in relation to the purported indemnification clause. However, we must assume that the State's attempt to establish indemnification rests exclusively on this permit, since the State has included no

other written documents in the complaint. Furthermore, although the State apparently argued at trial that it could recover from Amoco under a theory of implied or common law indemnity, it presented no such issue to this court on appeal. This argument is therefore waived. Adkins v. Elvard (1973), 155 Ind.App. 672, 294 N.E.2d 160; A.R. 8.3(A).

Additionally, in our examination of the complaint we must remember that in Indiana, in order for an indemnitor to be liable for the indemnitee's own negligence, there must be a written contract between the parties which contains a clear and unequivocal provision by which the alleged indemnitor knowingly and willingly assumes the onerous burden of indemnification for the indemnitee's negligence. Indiana State Highway Commission v. Thomas (1976), Ind. App., 346 N.E.2d 252. Finally, we reaffirm

the position in Indiana that the construction of a contract is a question of law where there is no ambiguity alleged to have arisen due to extrinsic facts and where the language of the contract is clear. Clyde E. Williams & Associates v. Boatman (1978), Ind.App., 375 N.E.2d 1138. Thus, in view of the above authority, the resolution of the issue of whether the complaint is sufficient is a pure question of law upon which this court can pass.

We find the Thomas case, supra, dispositive of the issue of whether the State is entitled to indemnity from Amoco. In that case the court stated, in 346 N.E.2d at 259:

> "The State's 'implied in law' indemnity theory can be disposed of quickly. It is the law of this State that one is not entitled to be indemnified against his own negligence in the absence of a contract to that effect. [Citations omitted].

* * * * * *

We have recently reiterated the applicable guidelines for resolution of a claim for indemnification by an indemnitee, based on a contract, for the indenmitee's own negligence:

> 'Contracts which provide indemnification for one's own negligence may if "knowingly and willingly" made, be valid and enforceable in Indiana. Loper v. Standard Oil Co. (1965), 138 Ind.App. 84, 211 N.E.2d 797; Weaver v. American Oil Co. (1972), 257 Ind. 458, 276 N.E.2d 144. However, such provisions are strictly construed and will not be held to provide indemnity unless so expressed in "clear and unequivocal" terms. Norkus v. General Motors Corp. (S.D.Ind.1963), 218 F.Supp. 398, 399. Vernon Fire & Casualty Ins. Co. v. Graham (2d Dist. 1975), Ind.App., 336 N.E.2d 829, 831.'

Hence the precise issue is whether the terms of . . . the parties' contract cleary [sic] and unequivocally manifest a commitment . . . knowingly

> and willing [sic] made, to pay for damages occasioned by the State's [indemnitee's] negligence." (emphasis in the original.)

In the case at bar, the clause purporting to impose indemnification upon Amoco reads as follows:

> "(n) The permittee [Amoco] shall assume all responsibility for any injury or damage to persons or property resulting directly or indirectly from the construction of any approach or driveway."

This provision contains no mention of the indemnification of the State by Amoco in case of the State's own negligence. Further, under the standards of the Thomas case, this provision is simply too vague to impose the burden of indemnification upon Amoco for negligent acts of the State. Thus the trial court did not err in sustaining Amoco's motion to dismiss.

The trial court is in all things affirmed.

Affirmed.

LOWDERMILK and ROBERTSON, JJ., concur.

FOOTNOTE:

[1]Ind.Code 34-4-16.5-1 et seq.

IN THE

SUPREME COURT OF INDIANA

STATE OF INDIANA, Appellant (defendant below),	)	
-v-	)	COURT OF APPEALS
GARY D. THOMPSON and PAUL C. THOMPSON, Appellees (plaintiff below),	)	CAUSE NO. 1-177 A 10
and	)	
AMERICAN OIL COMPANY, INC., Appellee (former Third-Party defendant below).	)	

DENIAL
OF "APPELLANT'S PETITION TO TRANSFER"

"Appellant's (State of Indiana) Petition to Transfer" is hereby DENIED this 9 day of October, 1979.

/s/ Richard M. Givan
RICHARD M. GIVAN
Chief Justice of Indiana

All Justices Concur in denial, excepting Prentice, J., who votes to grant transfer.

IN THE SUPREME COURT OF INDIANA
STATE OF INDIANA

GARY D. THOMPSON Appellant (Plaintiff below)	)	
VS	)	CAUSE NO. 1-1080A291
STATE OF INDIANA, Appellee (Defendant below)	)	

NOTICE OF APPEAL TO UNITED STATES' SUPREME COURT

TO: (1) CLERK OF THE SUPREME COURT OF INDIANA, 217 STATE HOUSE, INDIANAPOLIS, IN 46204;

(2) LINLEY E. PEARSON, ATTORNEY GENERAL OF INDIANA, 219 STATE HOUSE, INDIANAPOLIS, IN 46204.

Pursuant to United States' Supreme Court Rule 10 you and each of you are hereby notified that an appeal of this case and matter is being filed with the United States' Supreme Court on or about May 12, 1982; you are further advised as follows:

1. party taking appeal: Gary D. Thompson, Plaintiff before the trial court, Appellant before the Supreme Court of Indiana and before the Court of Appeals of Indiana;

2. judgment and decision appealed from: Gary D. Thompson is appealing the Indiana Court of Appeals' opinion of Thompson vs. State (1981), Ind.App., 425 N.E.2d 167, 168-178 (Judge Robertson dissenting at p. 178) for which transfer was denied by the Supreme Court of Indiana on February 9, 1982;

3. statute or statutes under which the appeal to the United States' Supreme Court is taken:

A. Fifth Amendment to the United States' Constitution as applied to the states by the Fourteenth Amendment (§1) of the United States Constitution (due process; taking of private property for public use without just compensation);

B. Fourteenth Amendment (§1) to the United States' Constitution (privileges and immunities; equal protection; due process; deprivation of citizen's property without due process of law; "special" law;

C. this appeal involves a challenge to the constitutionality of IC 34-4-16.5-17 (1974) of the Indiana Tort Claims Act of 1974 which, as interpreted by the courts of Indiana, deprived Appellant of any interest upon his July, 1976, judgment against the State of Indiana until said principal judgment was eventually paid interest free in November, 1979, after all appeals were exhausted unsuccessfully by the State of Indiana. See State v. Thompson (1979), Ind.App., 385 N.E. 2d 198.

C. RICHARD MARSHALL

/s/ C. Richard Marshall
Attorney for Appellant

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Filed: May 3, 1982

IN THE SUPREME COURT OF INDIANA
STATE OF INDIANA

GARY D. THOMPSON, Appellant (Plaintiff below)	)	
VS	)	CAUSE NO. 1-1-80A291
STATE OF INDIANA, Appellee (Defendant below)	)	

VERIFIED CERTIFICATE AND
PROOF OF SERVICE

This is to certify that on the 3 day of May, 1982, I forwarded the attached Notice of Appeal to United States' Supreme Court to Linley E. Pearson, Attorney General of Indiana, by certified United States Mail, return receipt requested.

/s/ C. Richard Marshall
C. RICHARD MARSHALL

STATE OF INDIANA)
SS:
COUNTY OF BARTHOLOMEW)

Subscribed and sworn to before me, Marcia J. Lyons, a Notary Public in and for said County and State, this 3 day of May, 1982.

/s/ Marcia J. Lyons
Marcia J. Lyons,
Notary Public
County of Residence:
Bartholomew

My Commission Expires:

February 2, 1986

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
JUN 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2077

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GARY D. THOMPSON,

Appellant,

v.

STATE OF INDIANA,

Appellee.

On Appeal from the Supreme Court of Indiana
MOTION TO DISMISS OR AFFIRM

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No. 81-2077

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GARY D. THOMPSON,

Appellant,

v.

STATE OF INDIANA,

Appellee.

MOTION TO DISMISS OR AFFIRM

The appellee, State of Indiana, respectfully moves this Court to dismiss this appeal or affirm the judgment of the Supreme Court of Indiana entered by that Court in Cause No. 1-1080 A 291 on February 9, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals of Indiana, dated August 19, 1981, is reported in *Thompson v. State*, ___ Ind. App. ___, 425 N.E.2d 167 (1981). That opinion, denial of rehearing, and denial of transfer by the Supreme Court of Indiana are appended to Appellant's Jurisdictional Statement.

JURISDICTION

Appellant alleges that jurisdiction is based upon 28 U.S.C. Section 1257(2). However, appellee would assert that there is no jurisdiction in this Court to review this case

on appeal as appellant has presented no substantial federal question.

QUESTIONS PRESENTED

The appellee would assert that the questions presented by the appeal are:

I. Does the Just Compensation Clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, prohibit the State of Indiana from setting the interest rate and timing of interest due on judgments rendered under the Indiana Tort Claims Act?

II. Does the Equal Protection Clause of the Fourteenth Amendment prohibit the State of Indiana from setting the interest rate and timing of interest due on judgments rendered under the Indiana Tort Claims act?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellant has alleged the involvement of the following provisions of the Constitution of the United States:

Amendments, Article Five:

> ...[N]or shall private property be taken for public use, without just compensation.

Amendments, Article Fourteen, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following provisions of the Indiana Tort Claims Act are in issue:

Indiana Code, Section 34-4-16.5-1:

This chapter applies only to a claim or suit in tort.

Indiana Code, Section 34-4-16.5-2:

(1) "Employee" and "public employee" means a person presently or formerly acting on behalf of a governmental entity whether temporarily or permanently or with or without compensation, including members of boards, committees, commissions, authorities and other instrumentalities of governmental entities, but does not include an independent contractor or an agent or employee of an independent contractor;

(2) "Governmental entity" means the state or a political subdivision of the state;

(3) "Incompetent" means a person who is under the age of eighteen [18] years or is incapable by reason of insanity, mental illness, or other incapacity of either managing his property or caring for himself or both;

(4) "Loss" means injury to or death of a person, or damage to property;

(5) "Political subdivision" means a:
(i) County,
(ii) Township,
(iii) City,
(iv) Town,
(v) Separate municipal corporation,
(vi) Special taxing district,
(vii) State college or university,
(viii) City or county hospital,
(ix) School corporation, or
(x) Board or commission of one [1] of the entities listed in clauses (i) through (ix), inclusive, of this subdivision;

(6) "State" means Indiana and its state agencies; and

(7) "State agency" means a board, commission, department, division, governmental subdivision including a soil and water conservation district,

bureau, committee, authority, military body, or other instrumentality of the state, but does not include a political subdivision.

Indiana Code, Section 34-4-16.5-17 (repealed 1980):

A claim or suit settled by, or a judgment rendered against, a governmental entity shall be paid by it not later than one hundred eighty (180) days after settlement or judgment, unless there is an appeal, in which case not later than one hundred eighty (180) days after a final decision is rendered. If payment is not made within one hundred eighty (180) days, the governmental entity is liable for interest from the date of settlement or judgment at an annual rate of eight percent (8%).

Indiana Code, Section 34-4-16.5-17 (1980):

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STATEMENT OF THE CASE

I. Nature of the Case

This appeal arises from the denial of transfer by the Supreme Court of Indiana of an opinion by the Court of Appeals of Indiana affirming the denial of interest by an Indiana trial court on a judgment rendered in tort in favor of appellant Thompson and against the State of Indiana.

II. Course of the Proceedings Below

Appellant Thompson sued the State of Indiana for damages in an Indiana trial court for the state tort of negligent highway design and obtained a judgment of $1.24 million on July 20, 1976 in the Johnson Circuit Court. The State of Indiana appealed, but the Indiana Court of Appeals affirmed the judgment on January 29, 1979, *State v. Thompson*, ___ Ind. App. ___, 385 N.E.2d 198 (1979), reproduced in Appellant's Appendix. The Supreme Court of Indiana denied transfer on October 9, 1979. On November 5, 1979, the State of Indiana paid the principal sum of the judgment into the trial court, which Thompson withdrew. On November 20, 1979, Thompson petitioned the trial court for eight percent interest on the principal sum from the date of judgment, which the trial court denied. Appellant Thompson appealed to the Court of Appeals of Indiana, which affirmed the trial court on August 19, 1981. Rehearing was denied September 25, 1981. The Supreme Court of Indiana denied transfer on February 9, 1982.

III. Facts Relevant to the Issues Presented For Review

Gary D. Thompson was injured in an automobile accident on an Indiana State highway on July 17, 1973. The Indiana Tort Claims act, including Indiana Code, Section 34-4-16.5-17 (repealed 1980) became effective on February 19, 1974. Thompson's trial court judgment was rendered on July 20, 1976. Indiana Code, Section 34-4-16.5-17 (1980) was amended prospectively effective March 3, 1980.

REASONS FOR DISMISSING THE APPEAL OR AFFIRMING THE JUDGMENT BELOW

I. Appellant Does Not Present to this Court a Substantial Federal Question Concerning the "Just Compensation" Clause.

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court found an "unconstitutional

taking" of private property by a Florida court clerk retaining for the county the interest on an interpleader fund. Relying on the Fifth Amendment, applicable to the States through the Fourteenth Amendment, this Court struck down the Florida statute involved as diverting what were indisputably private funds. The Court duly noted that the property interests involved were established by state law, not by the Constitution of the United States, following the teachings of *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Appellant Thompson has coupled the holding of *Webb's Fabulous Pharmacies, supra*, with the indisputable fact that Indiana law creates a vested right in a judgment at the time of entry by a trial court, *State v. Daley*, 165 Ind. App. 513, 332 N.E.2d 845 (1975); *Miller v. Jackson Township*, 178 Ind. 503, 99 N.E. 102 (1913), and has concluded that the State of Indiana has unconstitutionally "taken" a property right from him without just compensation. Thompson has erroneously ignored both substantive Indiana law concerning his alleged "property right" and the historical development of federal constitutional law concerning interest as established by the Supreme Court of the United States.

The common law doctrine of sovereign immunity was reduced to a residue in Indiana by judicial decree in *Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733 (1972). In response, the Indiana Tort Claims Act was passed, effective February 19, 1974, by the Indiana General Assembly, including Indiana Code, Section 34-4-16.5-17 (repealed 1980). Prior to the instant case, the Indiana courts issued three reported decisions holding that a tort claimant, such as Thompson, who was injured by a governmental entity, such as the State, *see* Indiana Code, Section 34-4-16.5-2, *prior* to the passage of the Indiana Tort Claims Act, but who obtained a judgment *after* the passage of the Act, was bound by the interest provisions in effect on the date of such trial court judgment. *Speidel v. State*, ___ Ind. App. ___,

386 N.E.2d 180 (1979) (transfer denied); *Glick v. Dept. of Commerce*, ___ Ind. App. ___, 387 N.E.2d 74 (1979) (transfer denied); *Holt v. City of Bloomington*, ___ Ind. App. ___, 391 N.E.2d 829 (1979) (transfer denied). It is based on these cases, coupled with the analysis of *Board of Regents v. Roth*, *supra*, that caused the courts below to find that no "property right" existed, so that no "taking" of property occurred. Thompson received the proceeds of a judgment based on the interest statute in effect on the date of said judgment, from monies paid into court from the undifferentiated public monies of the general fund of the treasury of the State of Indiana, as found by the Court of Appeals of Indiana. His reliance on *Webb's Fabulous Pharmacies*, *supra*, is thus entirely misplaced.

Furthermore, payment of post-judgment interest on a tort case has never been constitutionally mandated by the decisions of this Court as a matter of due process. The Supreme Court of the United States follows the rule that at common law judgments did not bear interest; rather interest is a creature of statute. *Pierce v. United States*, 255 U.S. 398, 406 (1921). No interest will lie against the United States, save by express statute or express contract. *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654 (1947). Interest is ordinarily part of "just compensation" against the United States only in the eminent domain context, not in other judgments. *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947).

Interest rates have historically been a question of legislative discretion. In *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163 (1933), this Court found that a legislative interest change concerning an unliquidated claim during a pre-judgment period was not violative of due process, as it was procedural only as affecting the remedy, even if it was retroactive. *Funkhouser* appears to be the leading case on the question. It was cited with approval as recently as 1976 in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). *Funkhouser*, *supra*, in turn, relies on *Missouri & A. Lumber*

& Min. Co. v. Greenwood Dist., 249 U.S. 170 (1919) and *Morely v. Lake Shore & Michigan Southern Ry Co.*, 146 U.S. 162 (1892). Both cases hold that an interest statute, or even total denial of interest, whether in tort or contract, can be changed or repealed without violation of due process or unconstitutional deprivation of property. Judgment interest is considered a matter of legislative discretion.

It has thus been settled law in this Court for over ninety years that judgment interest is a statutory creature subject to legislative discretion, and is not a subject of unlawful taking of private property. This, when added to the total lack of a property interest under Indiana law, compels the conclusion that no substantial federal question exists concerning Thompson's "just compensation" claim.

II. Appellant Does Not Present to This Court a Substantial Federal Question Concerning the "Equal Protection" Clause.

Appellant Thompson has correctly noted that the proper test for the equal protection challenge herein is the "rational basis" standard set out in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). The question then becomes whether the Indiana General Assembly could rationally have decided on the classification system used in the challenged statute. Thompson attempts to narrow the classification by questioning the distinction between a tort judgment against the State of Indiana as opposed to a judgment based on contract or a condemnation action. Appellant fails to recognize that the Indiana Tort Claims Act applies to *all* governmental entities in Indiana, not just the State. See Indiana Code, Section 34-4-16.5-1 and Section 34-4-16.5-2. As the Court of Appeals of Indiana recognized, some method of dealing with the cases culminating in *Campbell v. State, supra*, had to be legislatively devised, in order to avoid potential governmental insolvency, particularly of small counties and cites.

To treat the State of Indiana the same as its counties, cities and towns appears to be a rational purpose when coupled with the fiscal impact of pre-1974 unlimited tort liability. Such a legislative rational purpose does not violate equal protection. *New Orleans v. Duke*, 427 U.S. 297 (1976).

Seventy-two years ago, in *Griffith v. Connecticut*, 218 U.S. 563 (1910), this Court examined an appeal, challenging an equal protection grounds, an interest statute, concerning usury, which exempted banks and pawnbrokers. This Court found that statute to be a reasonable classification and granted Connecticut's motion to affirm. The State of Indiana respectfully suggests that this equal protection challenge also does not present a substantial federal question.

CONCLUSION

For these reasons, appellee, State of Indiana, respectfully moves the Court to dismiss this appeal or affirm the judgment of the Supreme Court of Indiana.

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Appellant's Reply Brief

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No. 81-2077

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

GARY D. THOMPSON,
Appellant,

v.

STATE OF INDIANA,
Appellee.

APPEAL FROM THE
SUPREME COURT OF INDIANA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

Section 34-1-31-1 of the Indiana Code (1973) provides:

> Assignment of judgments.—Judgments and decrees of a court of record for the recovery of money, and judgments obtained before a justice of the peace, may be assigned by the plaintiff or complainant, and the assignees thereof successively on or attached to the entry of such judgment or decree, and the assignment when attested by the clerk of the court, or such justice of the peace, shall vest the title to such judgment or decree in each assignee thereof successively.

Secion 34-2-22-1 of the Indiana Code (Cum. supp. 1982) provides in pertinent part:

> Claims and judgments against state—Interest—Exception.—

In actions or proceedings in which the state or any board, commission, agency or official is authorized by law to sue or be sued and in which a money judgment is authorized by law to be entered and to be paid out of state funds in the custody of the state or in the custody of any such board, commission, agency or official, interest shall attach to any such final judgment so entered at the annual rate of ten percent [10%] beginning with the forty-fifth [45th] day after the rendition thereof and not otherwise.

ARGUMENT

I. THE APPELLEE HAS NOT ADDRESSED THE APPELLANT'S CLAIM OF A PROPERTY INTEREST IN THE JUDGMENT BUT, INSTEAD, HAS ARGUED THAT NO PROPERTY INTEREST EXISTS IN THE INTEREST ON THE JUDGMENT.

In its Motion to Dismiss or Affirm, the Appellee State of Indiana has agreed with the Appellant Gary D. Thompson that Indiana law creates a vested right in a judgment from the time the judgment is entered by a trial court. (Motion to Dismiss or Affirm at 6.) Shortly thereafter, the State refers to "the total lack of a property interest . . ." (id. at 8), apparently meaning that Thompson did not have a property interest in the interest on the judgment. Certainly the State cannot be asserting that Thompson did not have a property interest in the judgment itself. As the State itself notes, that question already has been

decided by courts in Indiana, and the conclusion they have reached is that a property interest does exist in the judgment from the time it is entered. See, e.g., Indiana v. Daley, 165 Ind. App. 513, 332 N.E.2d 845, 849 (1975); Miller v. Jackson Township, 178 Ind. 503, 99 N.E. 102, 111 (1912).

Given that the judgment affirmed by the court in Indiana v. Thompson, 385 N.E.2d 198 (Ind. App. 1979) (see Jurisdictional Statement at A-55 to A-130), was Thompson's from and after July 20, 1976, the date the judgment was entered, the State's argument that Thompson has no constitutional right to interest is immaterial and totally misconstrues the arguments made by Thompson in his Jurisdictional Statement. The question presented to this Court is whether the State of Indiana may take from Thompson for a

period of 40 months what is admittedly his property without paying him for this taking. The interest requested by Thompson is merely a rough measurement of the value he has lost because he did not have use of his property for that 40-month period.

The term "property" has been defined in numerous ways. One of the most thorough is found in Black's Law Dictionary 1382 (Rev. 4th ed. 1968):

> PROPERTY. That which is peculiar or proper to any person; that which belongs exclusively to one; in the strict legal sense, an aggregate of rights which are guaranteed and protected by the government. . . . The term is said to extend to every species of valuable right and interest. . . . More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every

> legal way, to possess it, to use it, and to exclude every one else from interfering with it. . . . The exclusive right of possession, enjoying, and disposing of a thing. . . .
>
> The word is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments.

(Emphasis added.) Thompson, from the time of entry of the judgment, had precisely the same property rights in the judgment that he would have had in, for example, an automobile, mobile home, or truck.

He could have assigned or sold the judgment, for example. See Ind. Code § 34-1-31-1 (1973). The property in which Thompson had an interest as of July 20, 1976, may have been incorporeal and not physical; the interests that he had in that property were just as real, although incorporeal, as any interest he would have had in a physical object. It was the State's action in keeping from Thompson the property interests that were admittedly owned by Thompson that serves as the basis for this action. Thompson does not complain merely that he was denied monetary interest; he complains that he was denied property rights and asserts that monetary interest is a measurement of his loss.

The State refers to three decisions issued prior to the decision on appeal in which the Court of Appeals of Indiana applied monetary interest statutes in

effect at the time the judgments were entered. (Motion to Dismiss or Affirm at 6-7.) See Holt v. City of Bloomington, 391 N.E.2d 829 (Ind. App. 1979); Glick v. Department of Commerce, 387 N.E.2d 74 (Ind. App. 1979); Speidel v. Indiana, 386 N.E.2d 180 (Ind. App. 1979). Interestingly enough, in none of these cases was a due process claim decided. In Holt, the court specifically refused to discuss the due process question, 391 N.E.2d at 833, and in Glick and Speidel the question apparently was never raised. See 387 N.E.2d 74; 386 N.E.2d 180.

Furthermore, these three cases in no way were used by the court below to decide the substantive due process issue presented by this appeal. The three cases were cited below for the proposition that Thompson had not been denied procedural due process. (See Jurisdictional

Statement at A-26 to A-27.) They were not cited for and do not stand for the proposition that Thompson's property was unconstitutionally taken. Obviously, even if lower courts in Indiana had consistently determined the substantive due process claim against Thompson, this Court is not bound by those decisions. This is a question of law peculiarly within the ambit of this Court's authority to decide.

Thompson indeed did not receive interest because of the statute in effect at the time the judgment was entered. Reliance upon this statute by the State totally begs the question presented to this Court. This Court must decide whether the state action taken pursuant to that statute denied Thompson due process.

For this reason, Thompson reasserts that his reliance on the recent decision

of Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), is well placed. In Webb's Fabulous Pharmacies the state retained money that "plainly was private property." Id. at 160. In the case on appeal, the State of Indiana admits and the law of the State indicates that the money retained by the State was private property. In Webb's Fabulous Pharmacies this Court determined that the state's retention of interest pursuant to a state statute was an unconstitutional "taking." Id. at 164-65. The same rule obviously applies to the present appeal.

For these reasons and for the reasons enunciated in his Jurisdictional Statement, Appellant Thompson asserts that the decision of the court of appeals was incorrect and should be reversed by this Court before or after plenary consideration.

II. THE APPELLEE HAS ADVANCED NO RATIONAL REASON WHY A STATE MAY DISTINGUISH BETWEEN A TORT AND A NON-TORT JUDGMENT CREDITOR.

The State of Indiana and its political subdivisions, as correctly noted by the Appellee (see Motion to Dismiss or Affirm at 8-9), at one time retained interest it received on judgments that had been awarded to tort judgment creditors but that were held by the State and not distributed. See Ind. Code § 34-4-16.5-17 (1974; repealed 1980) (reprinted in Jurisdictional Statement at 2-3). The State could invest this money, recieving far more in interest than the eight percent that Thompson is claiming on this appeal. Then, at the end of an extensive appellate period, extending to 40-months in the present appeal, the State could pay the judgment amount while still retaining not only the eight percent interest claimed by Thompson but also the additional interest

above eight percent that it earned.

The State's reasoning in justifying this situation is as follows: political subdivisions of the State could face insolvency if they were forced to pay interest on the judgment. Therefore, the State itself should be excused from paying interest. (See Motion to Dismiss or Affirm at 8-9.) This reasoning is fallacious in several respects.

First, it does not address the equal protection question raised by this appeal. As argued in the Jurisdictional Statement, Thompson and other tort judgment creditors are owed by the State exactly what a judgment creditor that had been awarded a judgment based on another theory of law is owed: a sum of money. (See Jurisdictional Statement at 21 et seq.) The unequal treatment accorded a tort judgment creditor as compared with another type

of judgment creditor is not justified by the possible insolvency faced by governmental entities. An argument based on possible insolvency by a governmental unit because of having to pay interest on a judgment is applicable regardless of the underlying theory of the action. The state legislature has agreed to pay interest on several types of judgments. See, e.g., Ind. Code. § 34-2-22-1 (Cum. supp. 1982) (money judgments).

Second, an argument dealing with possible governmental insolvency does not address the facts as they exist in this case or in any similar case. The State had invested the judgment amount during the 40-month period of the appeal and received a return far greater than that claimed by Thompson. Because of this, the State is better off for having held the judgment for the 40-month period,

even if it must pay the interest claimed by Thompson, than it would have been had it paid the judgment promptly. It is difficulty to understand how this improvement in the financial position of the State or of any governmental subdivision could lead to insolvency.

Finally, the state legislature now agrees that the State and its political subdivisions should pay interest on tort judgments. See Ind. Code § 34-4-16.5-17 (1980) (reprinted in Jurisdictional Statement at 3-4). Certainly the legislature would not have required the payment of such interest if it expected such payments to lead to insolvency. This present policy demonstrates the lack of a real rational basis for the earlier policy.

In short, the State has advanced no rational basis for distinguishing between tort judgment creditors and non-tort

judgment creditors. The reasons advanced earlier by the Court of Appeals of Indiana also bear no rational relationship to any argued justification for the distinction. (See Jurisdictional Statement at 21-25.)

For the foregoing reasons and for the reasons enunciated in the Jurisdictional Statement, this Court should reverse the decision of the court of appeals either before or after plenary considerations.

CONCLUSION

For the aforementioned reasons, the Appellant prays that this Court grant plenary review of the decision of the Court of Appeals of Indiana.

Respectfully submitted,

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I hereby certify that I have on this _____ day of July 1982, mailed three copies of this Brief in Opposition to Motion to Dismiss or Affirm, first class, postage prepaid, to:

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